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IN SUPREME COURT, STATE OF WISCONSIN

AUGUST TERM, 1950

No. 55

NORMAN L. BAKER,
Plaintiff-Appellant,

vs.

JOHN H. LEENHOUTS, WISCONSIN DEPARTMENT OF TAXATION, AND GEORGE M. HANLEY, SHERIFF.
Defendants-Respondents.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the Plaintiff-Appellant submits herewith his statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of the State of Wisconsin entered in this cause.

Opinion and Judgment of Wisconsin Court

The opinion of the Supreme Court of Wisconsin is reported in Vol. 257, page 584 of Wisconsin Supreme Court

Reports and Vol. 44, page 544 of The Northwestern Reporter, 2nd Series.

A copy of that opinion, and also copies of the opinions, Findings of Fact and Conclusions of Law and judgment of the Circuit Court of Milwaukee County, affirmed by the judgment of the Supreme Court of Wisconsin, and copies of the pleadings in the action, are attached hereto as Appendix A.

However, the final judgment of the Supreme Court of Wisconsin was its decree upon Plaintiff-Appellant's motion for rehearing, overruling and denying the motion, with costs, entered in the records of said Court January 9, 1951. This petition for appeal therefrom is presented to the Chief Justice of the Supreme Court of Wisconsin herewith, on this 2nd day of April, 1951.

Jurisdiction

The jurisdiction of the Supreme Court of the United States, to review said decision and final judgment of the Supreme Court of Wisconsin, by direct appeal is conferred by Title 28, United States Code, Section 1257 (2).

The Plaintiff-Appellant is and always has been a citizen of the United States, and during the years 1943, 1944 and 1945 his domicile was in the State of Michigan, as found and adjudged in the judgment in this action.

The action was brought to avoid and enjoin the collection of income tax assessments of appellant's entire income of the years 1943, 1944 and 1945, including income from his securities held by him at his domicile in Michigan, and compensation for professional services rendered in various states other than Wisconsin.

The assessments were made under authority of Section 71.09 (6) Wisconsin Statutes of 1945, page 1197, which reads: "(6) In case of the failure on the part of any per-

son to make a report of income within the time and in the manner prescribed by law, the Department of Taxation or Assessor of Income may enter an assessment against said person upon ten days' notice in writing in a sum of not less than $500.00. Such notice may be served by mail. After the tax on such assessment has been entered on the assessment roll, the person assessed shall be forever barred from questioning the correctness of the same in any action or proceeding."

The Circuit Court and the Supreme Court on appeal, justify the assessment by the provision which appellant here emphasizes, of Section 71.01 (1) Wisconsin Statutes, 1945, page 1182 to-wit:

"71.01 *Persons and subjects taxable.* There shall be assessed, levied, collected and paid a tax on all net incomes as hereinafter provided, by every person residing within the state or by his personal representative in case of death, and by every nonresident of the state, upon such income as is derived from property located or business transacted within the state, except as hereinafter exempted. Every natural person domiciled in the State of Wisconsin, and every other natural person *who* maintains a permanent place of abode within the state or *spends in the aggregate more than seven months of the income year within the state, shall be deemed to be residing within the state for the purposes of determining liability for income taxes and surtaxes.* * * * "

Federal Questions Presented

In the Circuit Court and in the Supreme Court, appellant claimed that such provision if applied to the income of one domiciled in another state, was unconstitutional and invalid, because it would tax *subjects not within the power*

of the state to tax and because it would *abridge the fundamental rights of a citizen of the United States*, in violation of the provisions of Section 1 of the 14th Amendment.

While the State courts avoided a direct statement that the provision was valid, they denied appellant's claim and enforced the law. That constitutes a decision in favor of the validity of the law, within the meaning of 28 U.S.C. Section 1257 (2); N.Y. ex rel *Bryant* v. *Zimmerman* 278 U.S. 63, 67; 73 L. Ed. 184, 187.

Appellant's claim that the provision violates the 14th Amendment, Section 1, because it selects for taxation subjects not within its power to tax, is supported by *Safe Deposit & Trust Co.* v. *Virginia*, 280 U.S. 83.92, holding:

"A statute of a state which undertakes to tax things wholly beyond her jurisdiction or control conflicts with the Fourteenth Amendment."

Conn. General Life Ins. Co. v. *Johnson, Treasurer*, 303 U.S. 77; 82 L. Ed. 673; 58 Sup. Ct. 436.

Appellant's claim that the provision is unconstitutional and void because it would abridge or preclude the exercise of fundamental rights guaranteed by Section 1 of the 14th Amendment is supported by these cases:

Hess v. *Pawloski*, 274 U.S. 352, 355;

Colgate v. *Harvey*, 296 U.S. 404, 431, 56 Sup. Ct. 252, 80 L. Ed. 299;

Murdock v. *Pennsylvania*, 319 U.S. 105, 87 L. Ed. 1292.

Thus the case and the judgment of the Supreme Court of Wisconsin present federal questions which are subject to review by the Supreme Court of the United States, and which are properly submitted to that Court by direct appeal, pursuant to Sec. 1257 (2), 28 U.S.C.

Though less pertinent to those questions of the jurisdiction of the Supreme Court of the United States, than to the

question of the time and manner of presenting appellant's claim in the Circuit Court, attention is called to other cases and statutes of the State of Wisconsin. Wisconsin Statutes of 1945 and earlier statutes contain a provision in legal effect similar to said provision of Sec. 71.01 (1) but relating to income of corporations. It is Section 71.02 (3) (e), Wisconsin Statutes of 1945, page 1187, reading: "A foreign corporation whose principal business is carried on or transacted in Wisconsin shall be deemed a resident of this state for income tax purposes, and its income shall be determined and assessed as if it were incorporated under the laws of Wisconsin, notwithstanding its domicile is elsewhere."

In *Newport Co.* v. *Tax Commission*, 219 Wis. 293, the Supreme Court of Wisconsin held that provision invalid in the following language: "The state's next contention is that the State of Wisconsin, if the taxpayers principal business is located here, may, by legislative fiat, domesticate the corporation for purposes of taxation, and by this process give to its intangible property a local status. . . .

It seems evident to us that a state may not, by definition, construction, or other process, *domesticate a person* or corporation in fact domiciled elsewhere, in order to avoid the application of constitutional principles established by the Supreme Court of the United States relative to jurisdiction for purposes of taxation. To say that it may do so is to contend that the limits of the state's jurisdiction to tax are wholly selfimposed." (Emphasis of words "domesticate a person" supplied.)

Any doubt as to the purpose of the seven months provision of Sec. 71.01 (1) Wisconsin Statutes, to "domesticate a person . . . in fact domiciled elsewhere, in order to avoid the application of constitutional principles established by the Supreme Court of the United States relative

to jurisdiction for purposes of taxation" will be dispelled by reference to the construction of that provision by the Wisconsin court, in this case. Under that construction one becomes domesticated for purposes of taxation without having actually spent seven months in the state when he comes into the state for *"business activities"*. Then absence from the state for business purposes or for pleasure is to be considered time spent in the state, just as if he were domiciled in the state.

The Wisconsin Supreme Court recognises that income from securities of one domiciled without the state can not be subjected to Wisconsin income tax, constitutionally. Thus, in *State ex rel Manitowoc Gas Co.* v. *Wisconsin Tax Commission*, 161 Wis. 111, 114; 152 N.W. 848, 849 that court said: "The taxing power of a state does not extend beyond its territorial limits. *Union R.T. Co.* v. *Kentucky*, 199 U.S. 194, 26 Sup. Ct. 36. Within such limits it may tax persons, property, income, or business. State Tax on Foreign held Bonds, 15 Wall. 300. If the tax be on property it, or its lawfully constituted situs must be found within the state. If an interest in property is taxed the situs of either the property or interest must be found within the state. If an income be taxed, *the recipient thereof must have a domicile within the state* or the property or business out of which the income issues must be situated within the state so that the income may be said to have a situs therein." (Emphasis supplied)

Agreeable to state laws as well as federal law and constitution, the income of one domiciled in another state even though it includes earnings from services rendered in the state was not, in 1943, 1944 and 1945, selected for or subjected to taxation by statutes, regulations or practice of Wisconsin. *Briggs & Stratton Co.* v. *Wisconsin Dept. of Taxation*, 248 Wis. 160, 21 N.W. 2d 441.

Appellant is confident that in view of the authorities above cited, the several federal questions suggested by the Assignment of Errors will be correctly presented to the Supreme Court of the United States by direct appeal pursuant to Sec. 1257 (2) 28 U.S. Code; but if he is in error and it should be considered that such federal questions or any of them should be submitted for review by writ of certiorari instead of appeal, then appellant prays that these papers and this jurisdictional statement be regarded and acted on as a petition for writ of certiorari to review any such questions as if duly presented by certiorari to the Supreme Court at the time the appeal was taken, as provided by Section 2103, 28 U. S. Code.

The fundamental question presented upon the appeal is whether the first Section of the 14th Amendment, and appellant's rights under it, were violated by the levy of an income tax upon income not within the power of the state to tax, and were violated because such tax abridged the exercise of appellant's rights guaranteed by the Amendment. An important question is presented in limine, i.e. whether the constitutional question was properly and timely presented in the State courts.

Statement Respecting Time and Manner of Raising and Presenting the Constitutional Question in the State Courts.

Certain elements of subsection 6 of Sec. 71.09 Wisconsin Statutes, under which the assessments were made, are inconsistent with the Wisconsin Constitution and law, and in connection with the allegation of plaintiff's complaint that such elements were invalid, the complaint alleges that the provision "*if applicable to the case of one who is or claims to be domiciled in another state and for that reason not a taxpayer of Wisconsin and not liable to income taxa-*

tion and not required to make a report of his income to the assessor, is unconstitutional and void for the reason that it would contravene, violate and deny the plaintiff any protection of the following provisions of the Constitution of Wisconsin and the Constitution of the United States" followed by a complete quotation of Sec. 1 of the Fourteenth Amendment.

This was intended to charge and must have been understood to charge that as to the nonresident the entire provision of subsection 6, and any tax assessed under it upon the income of one domiciled in another state would contravene the 14th Amendment. It claimed the protection of the 14th Amendment from the assessments as well as from the statute under which they were made, as against every possible pretext. The seven months provision of Section 71.01 (1) was not mentioned because its invalidity was thoroughly established by the decisions and considered the well settled law of the state, and because the plaintiff was informed and believed that the assessments were made solely upon the claim that he was domiciled in Wisconsin, and that no claim of liability was based on that provision and it was not involved in the issues. Express declarations to that effect are not in the record, but those facts are proven by the following circumstances in the record:

For many years prior to 1941, appellant was employed as Assistant Counsel of the Northwestern Mutual Life Ins. Co. of Milwaukee. He maintained a home at Milwaukee, Wisconsin, which was his selected domicile, but for more than 25 years he had maintained a summer home at Beulah, Michigan. He planned to retire in 1941, upon reaching the age of 70 years (the normal retiring age, although he was permitted by the rules of that company to continue his employment for an additional five years), and before January 1, 1941, he selected his summer home at Beulah as his

permanent home and domicile. However, in 1941, because two members of the legal department had been called to military service because of the imminence of war, and to save their positions for them upon their return, appellant consented to continue his service until their return. Although appellant had effected his change of domicile and had assumed liability to taxes upon his intangible property and other taxes, at the place of his domicile in Michigan, his entire income of 1941 and later of 1942 was assessed in Wisconsin. The assessments were expressly claimed to be justified by the seven months provision of Sec. 71.01 (1). Before the Department of Taxation and in the Circuit Court upon appeal, as well as in the Supreme Court of Wisconsin upon appeal from the judgment of the Circuit Court, appellant orally and in briefs argued that said provision was invalid and unconstitutional unless it was considered as a mere disputable presumption, and cited numerous decisions in support of that argument. The Supreme Court of Wisconsin held appellant liable to the assessments on the sole ground that he had not effected a change of domicile because he had not entirely abandoned his home in Milwaukee and because of the continuance of his employment in the state, without reference to the seven months provision. (*Baker* v. *Department of Taxation*, 246 Wis. 611, 18 N.W. 2d 331.) Manifestly, the court did not refer in its opinion to the question of the validity of that provision, and based its decision upon the ground that appellant had not succeeded in changing his domicile (though plainly it ignored his rights under the 14th Amendment and disregarded established principles respecting change of domicile) because the invalidity of that provision was a completely settled question.

The complaint alleges that plaintiff's domicile and residence is at Beulah, Michigan. This of course referred to actual residence incident to domicile. Neither the denial of

that allegation nor the allegation of the answer that plaintiff was domiciled and resided in Wisconsin during 1943, 1944 and 1945, furnishes the slightest suggestion that the assessments were made under or justified by the seven months provision; and there was no allegation that they were.

Upon the trial plaintiff testified that he discontinued keeping a record of time spent at his domicile in Michigan or elsewhere in 1944 and 1945 because he concluded "that it was not claimed any longer" that the provision was valid and concluded "that my liability was based entirely upon being domiciled in Wisconsin, as these decisions held" (referring to the earlier cases holding plaintiff was domiciled in Wisconsin, and therefore liable to income taxes in 1941 and 1942). This testimony brought forth no denial or claim from the defendants that plaintiff's liability in this case was based on the seven months provision.

At no time during the trial did the attorney for the Wisconsin Department of Taxation or the assessor who was present and a witness at the trial, make any claim, argument or suggestion, that the seven months provision of Sec. 71.01 (1) Wisconsin Statutes was involved in the issues or justified the assessments. On the contrary the claim of liability was based solely upon the argument that plaintiff was domiciled in Wisconsin all the years 1943, 1944 and 1945 and all the time. The oral arguments are not in the record but the brief of the Department of Taxation as well as that of the plaintiff are in the record and were certified to the Supreme Court of Wisconsin. In the brief for the Department not only is the claim of liability based solely upon the assertion that plaintiff was domiciled in Wisconsin, but, inconsistent with any claim of liability under the seven months provision, it is argued that if the court should find plaintiff effected a change of domicile to Michigan at any

time within the period, 1943, 1944 and 1945, his income while domiciled in Wisconsin should be taxed and not that received subsequently, in accordance with Sec. 72.09 (2) Wisconsin Statutes 1945, and *Greene* v. *Tax Commission* 221 Wis. 531, 266 N.W. 270.

Plaintiff in his brief, in response to the argument of the Wisconsin Department of Taxation, expressed in its brief as follows: "The facts of his actual maintenance of a home, *his business connections*, the physical location and occupancy by his family of the home in Wisconsin would be the controlling factors", argued under the heading *"Place of Performing Services and Presence in State are not evidence of domicile"*, "Plaintiffs employment by the Northwestern is without evidentiary value because he had a right to continue such employment as a non-resident and without any tax liability. Since liability for taxation of income received for personal services, professions and vocations specifically follows the domicile, the fact of domicile must be determined independently of the place where such services were performed, and it is illogical and erroneous to say that the place of performance is proof of domicile." In support of his claim of right thus stated, he cited *Newport Co.* v. *Tax Commission*, 219 Wis. 293, and *Safe Deposit & Trust Co.* v. *Virginia*, 280 U.S. 83. The argument and these citations fully informed the court that plaintiff claimed the law under which the assessments were made, including the seven months provision if applied to the income of one domiciled in another state, violated the 14th Amendment.

Thus, it is submitted, the constitutional question was effectively raised before and at the trial.

"There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only

that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a while shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *Conn. General Life Ins. Co.* v. *Johnson* 303 U.S. 70, 80, 82 L. Ed. 673, 677.

The court was familiar with the decision in *Newport Co.* v. *Tax Comm.* 219 Wis. 293, 261, N.W. 884, and should not have overlooked the principle it announced so clearly applicable to the seven months provision of Sec. 71.01 (1) and should not have overlooked the fact that it was well settled by the state as well as the federal decisions that such provision was invalid for it contravened the provisions of Sec. 1 of the 14th Amendment. It should not be necessary to argue that the provision is unconstitutional, and the rule stated thus in 16 C.J.S. 89 Pg. 183; "One may not be estopped to deny the validity of a statute whose validity has already been passed upon at the instance of other parties" should be applied.

O'Brien v. *Whedock*, 184 U.S. 450, 46 L. Ed. 626. These incidents and the presumption that the assessments were not made in defiance of settled law, and that it was not intended to deprive plaintiff of his constitutional rights thereby, clearly show that the seven months provision was not involved in the issues, and that the attempt to justify the assessment by it first appeared in the case by the opinion of the Circuit Judge long before the statutory decision of the case by the court's findings of fact and conclusions of law. (See Sec. 270.33 Wis. Statutes).

Promptly upon the filing of that opinion, plaintiff filed a written motion that the trial court "grant a rehearing or that the court reconsider" its decision to uphold the assessments as justified by the seven months provision of Sec.

71.01 (1) though plaintiff was held to be domiciled in Michigan, and in such written motion, after argument that the provision could not constitutionally be construed as more than a disputable presumption, it was stated: "But even if the section were applicable under the facts proven, and even if the legislature had intended to create a conclusive presumption and indisputable liability to taxation within the state, it would be invalid and violative of the Fourteenth Amendment of the Constitution of the United States." And the motion after citing numerous other cases, said: "The question was finally and absolutely determined by our court in *Newport Co.* v. *Wisconsin Tax Commission*, 219 Wis. 293, 261 N.W. 884 and the more recent case of *Briggs & Stratton Corp.* v. *Wisconsin Department of Taxation*, 248 Wis. 160, 21, N.W. 2d 441."

Under the circumstances, this raised the constitutional question in proper time, in the trial court long before its statutory decision of the case.

Consolidated Coal Co. v. *Illinois*, 185 U.S. 203, 206, 46 L. Ed. 872, 875, in which it is held: "While the constitutionality of the law was not specifically set up and claimed before the trial in the Circuit Court, there was a motion made in arrest of judgment, in which the invalidity of the statute was specially set up upon the ground of its repugnancy to the 14th Amendment to the Constitution. The motion was denied, although the Supreme Court did not in terms pass upon the Federal Constitutionality of the law. But this was a sufficient presentation of the Federal Question."

National Mutual Building and Loan Association v. *Brahan*, 193 U.S. 635, 646, holds that a notice of a motion made by defendant after plea of the general issue to amend it to set up a federal question, which was denied, could not be considered as though he had "attempted to inject a

federal question into the record," and that whether the motion was granted or denied it was very clear that plaintiff in error was entitled to claim rights under the Federal Constitution by request for a directed verdict. "And if the rights asserted actually existed, plaintiff in error was entitled to an instruction directing a verdict in its favor."

There is no law, rule or practice in Wisconsin that prescribes the time or manner of raising the question of the constitutionality of the law involved in the issues. The law applicable must be principles of the common law as stated by the Supreme Court of the state. Such principles are summarized from earlier cases in the very recent (1949) case of *Wendtland* v. *Industrial Commission*, 256 Wis. 62, 39 N.W. 2d 854: "The point is attempted to be made that respondent did not make a timely challenge of the constitutionality of the Act. Constitutional rights of a citizen are not to be lightly regarded. Those rights were acquired at too great a cost and their value to our democracy is too important to be left to chance or to depend upon some non-essential technicality. The *mere element of time is not controlling.* (Emphasis supplied.) We do not find any hard-and-fast rules defining a waiver of constitutional rights, privileges and immunities that go beyond what is necessary to properly decide the cause at issue. It is more in accordance with judicial duty to determine such matters upon a view of the particular rights asserted and denied."

The Wisconsin cases uniformly hold, in harmony with common law definition and principles that an *intention to waive a known right* must be proven and found, unless the intention is presumed as a matter of law.

Wendlandt v. *Industrial Comm.*, 39 N.W. 2d 854, 256, Wis. 62

Nelson v. *Caddo-Texas Oil Lands Co.*, 176 Wis. 327, 329

Boston Store v. *Katz*, 153 Wis. 492, 526
J. I. Case Threshing Machine Co. v. *Johnson*, 152 Wis. 8, 10.

The Supreme Court of Wisconsin in this case, in disposing of the question of waiver, stated: "In accord with the rules that 'the constitutionality of a statute cannot be raised for the first time in an appellate court of a state or upon rehearing in a civil case' 11 Am. Jur. 772, we have held that 'It is well settled that constitutional rights as well as any other personal or property rights may be waived' ". It appears from the decisions cited to the text quoted that it refers solely to motions for rehearings after final decisions in appellate courts, and is not applicable to a motion in the trial court.

The decision of the Supreme Court of Wisconsin in this case is not supported by any authority and is inconsistent with and contrary to the settled laws of the state, and should not and may not control the decision of the Supreme Court of the United States on the question of waiver.

As said in the opinion of *Union Pac. RR Co.* v. *Public Serivce Comm.* 248 U.S. 67, 69; 63 L. Ed. 131, 132: "It is argued that a decision on this ground (waiver by alleged voluntary application to the Comm.) excludes the jurisdiction of this Court. But the later decisions show that such is not the law, and that, on the contrary, it is duty of this court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the Federal right has been waived."

As this court has said in *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282:

> "But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and privileges judi-

cially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on non-federal ground, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided."

Other cases: *Truax* v. *Corrigan*, 257 U.S. 312, 66 L. Ed. 254, 259. *Carter* v. *Texas*, 177 U.S. 442; 44 L. Ed. 839. *Davis* v. *Wechsler*, 263 U.S. 22, 68 L. Ed. 143. *Davis* v. *O'Hera*, 266 U.S. 314, 318, 69 L. Ed. 303, 307.

Even if plaintiff was in error in concluding that the seven months provision of Sec. 71.01 (1) was not involved in the issues, he certainly believed it was not and was induced to believe so by the conduct of the Wisconsin Department of Taxation. In fact the failure on the part of the Department and the Assessor of Incomes who made the assessments (who was present at the trial and a witness) to claim the assessments were made under authority of that provision or were justified by it when they knew plaintiff was acting on the assumption that the provision was not involved in the issues, was not an exercise of good faith, if later they should claim it was involved. It is the rule in such case, in harmony with the definition of waiver, that there will be no waiver of constitutional rights if the constitutional question is raised when the error is first revealed, even though it may be in a motion for rehearing in the appellate court. Therefore the claim of unconstitutionality of the statutes was timely made after the opinion of the trial court disclosed that the unconstitutional provision of the statute was relied upon.

International Steel & Iron Co. v. *National Surety Co.*, 297 U.S. 657, 665, 80 L. Ed. 961. *Safe Deposit and Trust Co.* v. *Virginia*, 280 U.S. 83.

Still another reason for holding that the question and claim were timely presented in the Circuit Court and that plaintiff was improperly deprived by the state courts of the protection of the Constitution, is that the Circuit Court did actually reconsider the question of the unconstitutionality of the provision, and thereupon it was its duty to decide the question correctly and not to avoid it.

The Circuit Court did reconsider the question when it urged counsel for the Department of Taxation to furnish a brief in reply to plaintiff's motion and argument as to the invalidity of the provision, and gave him nearly ten months time to prepare it. After ten months consideration of the question he furnished a brief in which he attempted to justify the court's views as to the constitutionality of the seven months provision, but did not claim any waiver of constitutional rights on the part of plaintiff. The court after considering the briefs and necessarily the constitutional question for 55 days, asserted the claim of waiver, and thus avoided a direct decision of the question submitted to it.

Finality of the Judgment of the Wisconsin Supreme Court

Later, the Circuit Court made and entered Findings of Fact and Conclusions of Law, constituting its decision (Wis. Statutes Sec. 270.33) and directing judgment in accordance with the earlier opinion, dismissing plaintiff's action on the ground that he was liable to the assessments by virtue of the seven months provision of Sec. 71.01 (1), and thereupon judgment was entered accordingly. Appellant appealed from such judgment to the Supreme Court of Wisconsin, the court of final resort. Upon such appeal in oral argument and in briefs, plaintiff-appellant renewed his argument that said provision contravened the Fourteenth Amendment and his rights guaranteed by it, and that he

had not waived his right to the protection of it, and cited many decisions in support of his claims.

By its decision filed November 8, 1950, the Supreme Court of Wisconsin affirmed said judgment of the Circuit Court. Plaintiff-appellant moved for a rehearing in the Supreme Court in accordance with the Wisconsin statutes, and again renewed his claims, particularly that there had been no waiver of his right to the protection of the 14th Amendment. The Supreme Court denied a rehearing January 9, 1951, which was the final judgment of that court. Under the Constitution and Laws of Wisconsin, appellant had no other remedy.

The Constitutional Questions Are Substantial

The questions involved in this appeal are not only of great importance to the appellant, now and in the future, but of great importance to thousands of citizens of the United States who will pass temporarily from their homes and domiciles to the large industrial cities of other states, to engage in the present defense work, just as they did in the last World War. It is important to them, as it is to appellant, to know whether entering the State of Wisconsin, or any other state, for the discharge of such duties and performance of such work will be burdened by unlawful taxation; whether their constitutional right to do so may be abridged or denied by abuse of the taxing powers. Corporations are also frequently confronted with the question presented herein when requiring its apprentices, employees or officers to go from factory to factory in different states for varying periods of time, or with varying degrees of regularity. In fact the question is of great importance to every citizen, for any citizen may at any time find it necessary to exercise fundamental rights secured by the 14th Amendment, in a state other than that of his domicile. The

question is substantial not only because it involves double taxation and the wrongful exaction of large sums of money from citizens of the United States, as a condition to the exercise of rights secured by the Constitution, but also because of the importance of the free exercise of those rights to the enjoyment of liberty and good government, and because of the duty of the Government to preserve those rights for the enjoyment of its future citizens and to secure them for the benefit of all its citizens now.

Respectfully submitted,

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APPENDIX A

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IN SUPREME COURT, STATE OF WISCONSIN

August Term, 1950

No. 55

NORMAN L. BAKER,
Plaintiff-Appellant,

v.

JOHN H. LEENHOUTS, WISCONSIN DEPARTMENT OF TAXATION, AND GEORGE M. HANLEY, SHERIFF,
Defendants-Respondents.

Filed Nov. 8, 1950. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

Appeal from a judgment of the circuit court for Milwaukee county, Charles L. Aarons, circuit judge. *Affirmed.*

This is an action in equity commenced in October, 1947 by which the plaintiff seeks to enjoin collection of income tax assessments levied against him upon his assumed income for the years 1943, 1944 and 1945.

The trial judge found among other things (1) that during the years in question plaintiff was domiciled in Michigan and did not maintain a permanent place of abode in Wisconsin; (2) that he spent in the aggregate more than seven months of each of the years within Wisconsin; (3) that he received income from personal services and intangible personal property during each of the years; (4) that he made no income tax returns or report to the authorities of Wisconsin during any of the years; (5) that upon due notice and in accordance with the provisions of paragraph (a) of subsections (4), (6) and (7) of sec. 71.09 Stats. the Assessor of Incomes for the Milwaukee district, in which plaintiff had spent his time in Wisconsin made assessments against him on his income for said years, and (6) that plaintiff did not in any of the pleadings or at the trial in any way challenge or contest the validity of the provisions of sec. 71.01 Stats. and particularly the pro-

vision that any natural person who spends in the aggregate more than seven months of the income year within Wisconsin shall be deemed to be residing within the state for purposes of determination of liability for income taxes and surtaxes, or assert that said provision is invalid or unconstitutional. Judgment dismissing the action was entered on December 31, 1949, from which this appeal.

GEHL, J. Plaintiff failed to make Wisconsin income tax returns for 1943, 1944, and 1945. The Assessor of Incomes, acting pursuant to the provisions of sec. 71.09, Stats. 1945, gave due notice to him that unless he made such returns within a specified time "doomage" assessments of income taxes would be made against him. The "doomage" assessments were made. Sec. 71.09 provides:

"71.09. Power of assessment; filing returns; penalties. (1) * * *

"(2) * * *

"(3) * * *

"(4) (a) Whenever in the judgment of the assessor of incomes any person other than a corporation shall be subject to income tax in his district under the provisions of this chapter, he shall notify such person to make report to him on or before March fifteenth of each year in such manner and form as the department of taxation shall prescribe, specifying in detail the amounts of income received by him from all sources, together with the amounts of income received by his dependents, his wife and each child under 18 years of age residing together with him as members of the family, and such other information as the department shall deem necessary to enforce the provisions of this chapter. * * *

"(b) * * *

"(c) * * *

"(5) * * *

"(6) In case of the failure on the part of any person to make a report of income within the time and in the manner prescribed by law, the department of taxation or assessor of incomes may enter an assessment against said person upon 10 days' notice in writing in a sum of not less than $500. Such notice may be served by mail. After the tax

on such assessment has been entered on the assessment roll the person assessed shall be forever barred from questioning the correctness of the same in any action or proceeding." * * *

As has been stated, the trial judge found that plaintiff spent in the aggregate more than seven months of each of the years in question in Wisconsin, and concluded that therefore he was to be deemed to be residing within the state for the purposes of determining liability for income taxes and surtaxes. The assessments were authorized by the provisions of sec. 71.01 Stats., the material portions of which are:

"* * * every other natural person who . . . spends in the aggregate more than seven months of the income year within the state, shall be deemed to be residing within the state for the purposes of determining liability for income taxes and surtaxes. * * *"

Plaintiff challenges the finding. The trial judge in his memorandum opinion discusses in some detail the evidence and circumstances which prompted the finding. His analysis, which describes in a general way the nature of plaintiff's testimony which bears upon his claim that he spent more than five months of each year outside the state, and a thorough examination of the record convinces us that there is ample support for the finding. The learned trial judge said:

* * *

"It is quite apparent from the entire testimony of plaintiff that he so construed the seven months provision of section 71.01 as to make necessary or appropriate a mathematical computation of the exact number of days during which he was physically absent from the State of Wisconsin in order to determine the fact as to whether he 'spends in the aggregate more than seven months of the income year within the state'."

"I am of the opinion that such method of computation is not contemplated by the statute in question. Pleasure trips with his wife at week ends and business trips by the plaintiff on behalf of his employer should not be excluded from the

time 'spent' in the State of Wisconsin. In making such trips the plaintiff always intended, after attaining the objective of the trip, to return to his headquarters which were unquestionably in Milwaukee. I am of the opinion that where one spends most of the 'weekdays', that is, from Monday to Friday, (except his vacation periods) in a place where he has all of his business activities that he thereby 'spends' in the aggregate more than seven months of the income year within the state. * * * "

Plaintiff contends that the provisions of sec. 71.01 Stats. are unconstitutional and invalid and that he did not waive such claim. The plaintiff served and filed a complaint and two amended complaints. No question as to the constitutionality of the statute was raised in either of the pleadings, nor was there such claim made in plaintiff's briefs prior to the original decision of the Court. No mention of such claim was made until upon "plaintiff's motion for rehearing in respect to the effect of Section 71.01 Wisconsin Statutes" he filed a brief in which he raised the question. He offers as one of the reasons for his failure to make such claim earlier the assertion that he was "so satisfied that the question was so settled that the provision was invalid and unconstitutional that he considered it unnecessary . . . to present any argument to that effect to the Circuit Court," and cites *Newport Co.* v. *Wis. Tax Comm.*, 219 Wis. 293, 261 N.W. 884 as establishing the invalidity of the statute. That case related to the taxation of the income of a corporation which is not a natural person. It is not applicable here. If his contention as to the invalidity of the statute might otherwise be considered the reason given for his failure to raise the question does not suffice.

In accord with the rule that "the constitutionality of a statute cannot be raised for the first time in an appellate court of a state or upon a rehearing in a civil case," 11 Am. Jur. 772, we have held that,

"It is well settled that constitutional rights, as well as any other personal or property right, may be waived (citing cases)."

Booth Fisheries Co. v. *Industrial Comm.*, 185 Wis. 127, 200 N.W. 775.

"It is the duty of a person who claims that an ordinance invades rights guaranteed by the constitution to raise that question at his earliest opportunity."

Hayes v. *Hoffman*, 192 Wis. 63, 211 N.W. 271.

Plaintiff contends that because sec. 71.01 Stats. confers no benefit upon him and he sought none under its provisions he is not now estopped to assert its invalidity and cites *Wendlandt* v. *Industrial Comm.*, 256 Wis. 62, — N.W. —. Language is used in the opinion filed in that case which would seem to support his claim, but it should be observed that in that case the court pointed out that "the record does disclose that the unconstitutionality of the act was directly and positively asserted early and, certainly, as soon in the proceedings as it could be submitted to a judicial tribunal." That is not the case here. As we have pointed out, plaintiff did not assert his claim of the invalidity of the statute until after all of the issues had been determined in the trial court.

Plaintiff's contention that because the statute confers no benefit upon him and he sought none under its provisions he is not precluded from his attack upon its validity assumes that the department relies upon the rule of estoppel. The department invokes the doctrine of waiver, not estoppel, and we agree that there has been a waiver which requires denial of the relief sought.

The determination of the issues here considered makes it unnecessary for us to determine the other matters treated by counsel.

By the Court.—Judgment affirmed.

Filed April 2, 1951. Arthur A. McLeod, Clerk of Supreme Court, Wisconsin

THE DECISION OF THE CIRCUIT COURT

October 25, 1948

Chas. L. Aarons, Judge

[Title omitted]

This is an action in equity in which the plaintiff demands judgment enjoining the collection of the income tax assessments levied against the plaintiff upon his assumed income for the years 1943, 1944 and 1945. The plaintiff having failed to file income returns for said years, the Assessor of Incomes proceeded to levy assessments under sec. 71.09(6).[1]

The sole question raised by the plaintiff is whether he was liable to income taxation in Wisconsin for income received by him during any of said three years. He asserts nonliability for such income in Wisconsin on the ground that he was not a resident of, or taxpayer in, Wisconsin during such period, and that his domicile was and is at Beulah in the State of Michigan; that he therefore was not obliged to make and file any income returns to the tax authorities of the State of Wisconsin.

After the assessment (for the income years of 1943 and 1944) had been made by the Assessor pursuant to sec. 71.09(6), the plaintiff made application under 71.12 "for the abatement of such assessment and the tax."

As his reason for such application the plaintiff stated:

> "I represent as my reason for such application that I did not at any time in said years reside within the State of Wisconsin; that at no time during either of said years was I domiciled in said State; that I maintained no permanent place of abode in said State in either of said years; that I did not spend in the aggregate more than seven (7) months of either of said years in said State; and that during the whole of each of said years I resided and was domiciled at the Vil-

[1] All statutory section numbers cited herein are those of the 1945 statutes.

lage of Beulah, in the State of Michigan and there maintained my permanent home and place of abode; that I had no income derived from property located or business transacted within the State of Wisconsin; and no income subject to income taxation in said State, in either of said years." (Exhibit 7)

Because the assessments had been levied under sec. 71.09(6) and not under sec. 71.12, pertaining to "additional assessments," the Assessor informed the plaintiff that the assessments made and the taxes based thereon were not subject to further correction, review or appeal. (Exhibit 11)

The defendants contend (1) that this action is barred by the terms of sec. 71.09(6); (2) that the facts do not establish domicile of plaintiff to be outside of Wisconsin during the years involved; (3) that the facts do not establish that the plaintiff was a nonresident of this state during the years involved.

The plaintiff contends that he can not be precluded from proceeding in equity because the Wisconsin statutes do not provide any remedy, administrative or judicial, by way of reviewing a so-called "doomage" assessment made under sec. 71.09(6); and that if the statute were to be so construed as to authorize such assessment against a nonresident of the State of Wisconsin who fails to file a return of income without provision for a hearing before some tribunal, the statute would necessarily fall as unconstitutional.

The response of the defendants to this latter contention is to the effect that the plaintiff has failed to exhaust the administrative remedy which, they contend, has been provided by the statute in that he was required to file an income return; and that if he had done so certain administrative procedure under sec. 71.12 would have been applicable; and that having thus failed to file a return, he may properly be barred from seeking any remedy in the courts.

I have reached the following conclusions on the various contentions of the parties:

I

The failure of the plaintiff to make and file an income return and the Assessor's action under sec. 71.09(6) does

not operate to bar the present action. If it did so operate, it would require him—claiming to be a nonresident and not bound to submit himself to the state's jurisdiction—to do the very thing which he contends he is not bound to do and which, if he so complied, would make him liable to assessment. It is held that if he files a return he assesses himself and has no right thereafter to a court review to correct any error he may have made in his self-assessment.

Whitbeck v. Wisconsin Tax Comm., 207 Wis. 58, 67, 68, 80 A. L. R. 373, 378.

The fact that plaintiff may not ultimately prevail in his contention that he is not domiciled in or is not a resident of Wisconsin does not operate to compel him initially to waive his right to contest the question of his domicile or residence.

The making of an income tax return, which under the *Whitbeck* case would operate to prevent a court review (on his petition) of the initial assessment, can in no sense be regarded as the first and essential step of an "administrative remedy" as argued by the defendants' counsel. This I consider so obvious as not to require further discussion.

There being no other method of review provided in the statutes, the plaintiff is properly in court in the present equitable action.

II

Except as to income of nonresidents derived from property located, or business transacted, in this state, the basis of assessment of the Wisconsin Income Tax is *residence* within this state. (Sec. 71.01) That statute defines what is included within the scope of the term "residing in this state." It provides:

> "Every natural person domiciled in the state of Wisconsin, and every other natural person who maintains a permanent place of abode within the state or spends in the aggregate more than seven months of the income year within the state, shall be deemed to be residing within the state for the purposes of determining liability for income taxes and surtaxes."

The statute properly assumes that there is a distinction between legal "domicile" and "residence," although the two terms are generally used as equivalents. See: *Restatement on "Conflict of Laws,"* Chapter 2, particularly sections 9 to 12, inclusive; *In re Village of Chenequa,* 197 Wis. 163, 168; 28 *Corpus Juris,* Sec., p. 5 (Domicile § 2). The distinction between residence and domicile is well stated in *Cooper's Adm'r v. Commonwealth* (Va.), 93 S. E. 680, at page 683. See *Penfield v. Chesapeake, etc., Co.,* 134 U. S. 351, 356-357, 33 L. Ed., 940, 943-944, where the court said:

> "The domicile of the citizen may be in one state or territory, and his actual residence in another."

See also:

District of Columbia v. Murphy, 314 U. S. 441, 454-455, 86 L. Ed. 329, 337.

1. *As to Domicile*

The first element in the above quoted statutory definition is "domicile." The matter of plaintiff's domicile has been litigated in income tax cases in this state involving plaintiff's income received in previous years.

Baker v. Dept. of Tax, 246 Wis. 611 (involving the year 1941);

Baker v. Dept. of Tax, 250 Wis. 439 (involving the year 1942).

In each of those cases the circuit and supreme courts affirmed findings of the Wisconsin Board of Tax Appeals to the effect that plaintiff had not established the fact that he had abandoned his domicile in Wisconsin and established a new domicile in Michigan.

In the last case (250 Wis. 439) involving the 1942 income taxation, it appeared that evidence was adduced on behalf of the plaintiff showing some facts additional to those which were disclosed by the evidence in the previous case, but it was said: "The additional facts are not of sufficient consequence to overcome the board's finding upon the other evidence" (*Id.* 440).

In the instant case evidence was received of a number of additional facts having a bearing on the subject matter of plaintiff's domicile. In August 1942 plaintiff submitted to the Wisconsin Department of Taxation a written declaration of residence in which he stated facts from which it prima facie appears that he intended his domicile to remain in Beulah, Michigan (Exhibit 1). While that was a mere declaration, it was followed by his registration as a voter in Michigan in June or July 1943 and by actually voting at elections for state and county offices in Michigan not later than 1944. Each of at least two registrations required an affidavit by the plaintiff to the effect that he was a resident of the state of Michigan. In his Federal income returns during the years involved his domicile was likewise represented to be at Beulah, Michigan.

A number of the facts shown in the evidence in support of plaintiff's claim of a Michigan domicile are the same as, or similar to, those testified to in the previous cases above referred to. The exact quantum and character of evidence and the precise amount (in time or frequency) of plaintiff's physical presence in his Michigan home cannot be determined for future years by the evidence produced in respect to former years. Nor is it contended that this court, trying the facts on the evidence in this case, must be bound by findings of other tribunals based on evidence submitted to them, even though the evidence is quite similar. The persistent continuity of certain acts of the plaintiff from year to year in seeking in good faith to establish a domicile in another state should be accorded some weight. If that were not true he could be deprived of a fundamental right to change his domicile as long as he had any occasion to transact business, or spend time, in Wisconsin.

The argument is made by defendants' counsel that plaintiff's testimony respecting registration and voting is vague and uncertain as to time. While it lacks precision as to actual dates, the court can not discredit the testimony for that reason. The plaintiff is a lawyer of many years of experience. In exercising the right of suffrage in Michigan he must realize the solemnity of the act. It must be assumed that he fully understands the seriousness of the exercise of

the right of suffrage and of the making of any false affidavit respecting thereto. The presumption is in favor of his honesty and good faith in thus acting to choose a new domicile.

In *Cooper's Adm'r v. Commonwealth*, 93 S. E. 680, 683 (Va.), the court said:

> "In doubtful cases particular significance should be attached to the repeated exercise of the right to vote, because this right depends upon citizenship and domicile, and must be generally, if not universally, supported by the oath of the voter. Its unlawful exercise subjects him to prosecution both for illegal voting and for perjury if he swears falsely, and such act is a distinct, unequivocal, and public assertion by the voter of his legal domicile."

And see comments of Justice *Crownhart*,
In re Village of Chenequa, 197 Wis. 163, 167, 168.

While there are facts pertaining to plaintiff's occupations, activities, business and physical presence in the city of Milwaukee which make this a close case on the question of domicile, I am of the opinion that in such a case a declaration of intention, such as was made by the plaintiff in August 1942, and designated herein as Exhibit 1, followed up by his registration as a voter and actual exercise of the voting privilege in the State of Michigan, are elements of a strongly persuasive, if not controlling, character. *Mitchell v. U. S.*, 21 Wall. (U. S.), 350, 353, 22 L. Ed. 584, 588. A more recent case refers to the act of voting as "highly relevant but by no means controlling." *District of Columbia v. Murphy*, 314 U. S. 441, 456, 86 L. Ed. 329, 338. The Attorney General of this State has recognized that such acts are sometimes the "determinative factor."

(32 *Ops. Atty. Gen.*, 92, 94.)

This principle, as applicable to voting, has been placed in statutory form in this State by sec. 6.51(10), Wis. Stats., which provides:

> "If a person shall go into another state and while there exercise the right of a citizen by voting, he shall

be considered and held to have lost his residence in this state."

Considering plaintiff's exercise of such political rights as a "highly relevant" fact in connection with his acts bearing upon his establishment and occupancy of the home in Beulah, Michigan, and his other conduct, as detailed in the record, pertaining to his manner of living both in Wisconsin and Michigan, and his declarations and acts since 1941 by which he sought to establish his domiciliary status in Michigan, I am satisfied from the evidence that during the years here involved the plaintiff's principal establishment, regarded by him as his permanent home—his domicile—was at Beulah in the State of Michigan.

2. *As to permanent place of abode.*

The statute above quoted (71.01) provides that in addition to those persons who are domiciled in Wisconsin

> "every other natural person who maintains a permanent place of abode within the state" * * * "shall be deemed to be residing within the state" etc.

Evidence was produced as to where plaintiff stayed while in Milwaukee; as to where he kept his clothing and baggage; as to his rooming arrangement at the Summit Avenue house where he formerly resided, and which was occupied, during the years here involved, by married members of his family including his wife, and frequently (as hereinafter indicated) by himself. In the light of all the evidence, which need not be detailed, I cannot find that the plaintiff maintained "a permanent pace of abode" in Wisconsin.

3. *As to the seventh months' provision.*

In addition to those persons domiciled in Wisconsin, and those others who maintain a permanent place of abode within the state,

> "every other natural person who" * * * "spends in the aggregate more than seven months of the income year within the state, shall be deemed to be residing

within the state for the purposes of determining liability for income taxes and surtaxes."

There is considerable evidence respecting the number of days—and even fractions of days—during which the plaintiff was physically absent from the State of Wisconsin. These absences, excepting certain periods in the summer months which were spent in Beulah, Michigan, were of two kinds. At week ends, that is from sometime during Friday until the following Monday morning, the plaintiff and his wife frequently went to Chicago on a pleasure excursion. At other times the plaintiff and his wife would take a week end trip to Beulah, Michigan. At various times the plaintiff took business trips out of the state on behalf of his employer, the Northwestern Mutual Life Insurance Company. For a time the plaintiff kept entries in the form of a diary respecting the various trips taken by him outside of the state. Later, and after the decision in one of the previous cases, he discontinued that practice.

On direct examination he testified as his conclusion that during the three years involved he spent "much less than the seven months here and spent more in days outside of the State—much more than the five months out of Wisconsin." He gave many details on cross examination. In his testimony he estimates that a correct average of the number of nights that he slept at the Summit Avenue residence in Milwaukee was not more than three and half a week. There were, however, other nights when he slept at his Second Street building office.

It appears that usually during the three years involved the plaintiff was in Milwaukee from Monday morning until late Friday afternoon, although there were times when he took the noon boat on Friday to go to Beulah, Michigan. His main occupation was that of an assistant general counsel for the Northwestern Mutual Life Insurance Company. For that purpose he had an office in the building of that life insurance company in Milwaukee. His other activities of a business nature involved his work as a trustee of a building known as the Madison Building, otherwise known as the Second Street Building. He had an office in that building in the city of Milwaukee for the purpose of

transacting his office business as such trustee. There, he testified, he wrote "hundreds of letters." He also had other business activities in this state in connection with the handling of a family trust in which he and his wife were trustees. This trust handled a variety of securities, including real estate bonds. He also received compensation of $1,500 a year from the Downing Box Company of Milwaukee (whose attorney he had formerly been) but without performing any active services during the years here involved except that he was a director of the company.

The plaintiff's wife filed her income tax returns during the years in question with the Assessor of Incomes at Milwaukee. The plaintiff had nothing to do with the making of her returns but he stated that he had seen returns of Mrs. Baker in which she gave her address as Summit Avenue, Milwaukee, stating at the same time that her husband, the plaintiff, was a nonresident. Mrs. Baker usually took the pleasure trips with her husband to Chicago at week ends, and also made the trips with her husband when he went to Beulah, Michigan.

The plaintiff stated that he made no claim that he and Mrs. Baker had separate residences or domiciles. He added: "The fact is that she submitted her return here because she didn't want to be obliged—as I thought the law was—to be in Wisconsin five months of the—or to be out of Wisconsin five months of the year."

It is quite apparent from the entire testimony of plaintiff that he so construed the seven months' provision of section 71.01 as to make necessary or appropriate a mathematical computation of the exact number of days during which he was physically absent from the State of Wisconsin in order to determine the fact as to whether he "spends in the aggregate more than seven months of the income year within the state."

I am of the opinion that such method of computation is not contemplated by the statute in question. Pleasure trips with his wife at week ends and business trips by the plaintiff on behalf of his employer should not be excluded from the time "spent" in the State of Wisconsin. In making such trips the plaintiff always intended, after attaining the

objective of the trip, to return to his headquarters which were unquestionably in Milwaukee. I am of the opinion that where one spends most of the "weekdays," that is, from Monday to Friday (except his vacation periods), in a place where he has all of his business activities that he thereby "spends" in the aggregate more than seven months of the income year within the state.

As above indicated, the right of the State to levy an income tax is based primarily upon residence in Wisconsin. Under our statute to be domiciled in Wisconsin is "deemed" residence. But even though domiciled elsewhere, to maintain a permanent place of abode, or to spend in the aggregate more than seven months of the income year within the State, shall be *deemed*[2] to be residing within the State for the purposes of determining income tax liability. On the basis of such residence alone, income taxation may be sustained by virtue of the Wisconsin statute. Its constitutionality has not been challenged.

It must be found that the plaintiff did, within the meaning of sec. 71.01, Wis. Stats., spend in the aggregate more than seven months of each of the income years here involved in the State of Wisconsin; and that he must therefore be deemed to be residing within the State of Wisconsin during such period, notwithstanding the fact that his legal domicile was in Michigan during such period. (As to distinction between "domicile" and "residence" see *ante* p. 4.)

III

There is some discussion in plaintiff's brief pertaining to the inadequacy of the notices given by the Assessor of Incomes to the plaintiff pursuant to sec. 71.09(6). Complaint is made that the proposed amount of the assessment was not stated in such notices. (Exhibit 5 (October 29, 1945) pertaining to the income years 1943 and 1944, and Exhibit 15 (February 17, 1947) pertaining to the income year 1945.)

The earlier notices were to the effect that the Assessor would proceed in accord with sec. 71.09 (6) (Exhibit 5) or

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[2] The word "deemed" was substituted for "presumed" by Chapter 544, Laws of 1935.

in accord with Chapter 71 (Exhibit 15) to "levy an assessment" unless the return be filed. The later notices were to the effect that the assessments have been "levied" and that they "will be entered on the * * * tax roll." The later notices state the amounts of the assessments as estimates of plaintiff's income. The statute (71.09(6)) requires ten day's notice of the *entry* of such assessments.

As to the various meanings of the word "levy" in tax statutes see:

Borner v. *Prescott*, 150 Wis. 197, 203-204;

Petition of Wausau Inv. Co., 163 Wis. 283, 288.

Whether or not the later notices referred to (Exhibits 6 and 16) are adequate to meet plaintiff's objection need not be determined in this case. Neither the original complaint nor the first or second amended complaints filed in this action contain any allegation to the effect that the notice given under sec. 71.09(6) was defective in the respect named. On the other hand, each of said complaints relies solely upon the contention that the plaintiff was not obliged to make or file any income return to the tax authorities because of the alleged fact that he was not a resident of, or taxpayer in, the State of Wisconsin during the years in question.

Attention is also directed to the fact that the transcript of the testimony taken in this action contains a statement made by plaintiff's counsel when an objection was made by him to a question pertaining to the amount of the income derived from a certain trust. That statement reads as follows:

> "Mr. Norman J. Baker: I will object to that again as immaterial. There is a particular assessment in question with the issues raised as to whether he is domiciled in Wisconsin. There is not any question about over—or under—payment of the tax. The amount of the tax is not in question."

It thus appears to be unnecessary to consider any question pertaining to the omission of the proposed amount of the assessment from the notices (Exhibits 5 and 15) given

by the Assessor of Incomes to the plaintiff pursuant to sec. 71.09(6).

Findings of fact and conclusions of law pursuant to the foregoing memorandum may be presented. Judgment should be granted in favor of the defendant dismissing the complaint with the usual costs.

(s) CHAS. L. AARONS, *Circuit Judge.*

Dated at Milwaukee, Wisconsin this 25th day of October, 1948. Cover.

DECISION ON PLAINTIFF'S MOTION FOR REHEARING

Oct. 19, 1949.

Chas. L. Aarons, Judge.

[Title omitted]

The court's decision in this matter, dismissing plaintiff's complaint and granting judgment in favor of the defendant, was filed October 25, 1948. Thereafter plaintiff's counsel transmitted to the court a brief designated "Plaintiff's Motion for Rehearing in Respect to the Effect of Section 71.01, Wisconsin Statutes." Briefs from counsel for both parties were later received by the court, the final one having been submitted on August 25, 1949.

The plaintiff's brief on such motions deals solely with that part of this court's decision (beginning at page 9) which discusses and passes upon the "seven months'" provision contained in section 71.01, Wisconsin statutes.

(References to this court's decision of October 25, 1948 will be hereinafter referred to by the letter "D".)

Section 71.01, Wis. Stats., 1945, reads as follows:

> "71.01 *Persons and subjects taxable.* There shall be assessed, levied, collected and paid a tax on all net incomes as hereinafter provided, by every person residing within the state or by his personal representative in case of death; and by every nonresident of the state, upon such income as is derived from property located or business transacted within the state, except as here-

inafter exempted. Every natural person domiciled in the state of Wisconsin, and every other natural person who maintains a permanent place of abode within the state or spends in the aggregate more than seven months of the income year within the state, shall be deemed to be residing within the state for the purposes of determining liability for income taxes and surtaxes. This section shall not be construed to prevent or affect the correction of errors or omissions in the assessment of income of former years in the manner provided in sections 71.10 and 71.11."

The proposition presented by plaintiff in his brief is that the words "residing within the state" (in sec. 71.01) must be construed the same as if the words "domiciled within the state" were used; and that if construed as authorizing an income tax upon the net income (from intangibles) of persons "residing in this state" whose domicile was elsewhere the statute is unconstitutional.

(*Newport Co.* v. *Tax Comm.*, 219 Wis. 293;
and other cases cited in plaintiff's brief.)

In view of such contention a review of the pertinent proceedings in this action is appropriate.

In its decision this court reached the conclusion that the plaintiff's "domicile" during the times involved was in Michigan (D, pages 4 to 8). This conclusion was based primarily upon the fact that plaintiff had voted in Michigan in 1944, after registering as a voter in 1943 following his August 1942 declaration of intention made to the Wisconsin Department of Taxation.

While the words "domicile" and "residence" are often used interchangeably, the Wisconsin statute (71.01) employs language which unequivocally makes a distinction between the two terms (D. page 4). It thus differs from such statutes as the North Dakota statute. In *Schillerstrom* v. *Schillerstrom* (N. D.), 32 N. W. (2d) 106, 114, it is said

"The words 'residence' and 'domicil' are not always synonymous at law, nor are they convertible terms when used accurately. (Citing) But, as used in the

> various statutes, this depends upon the intent of the particular statute as ascertained by the construction of its provisions. Thus, 54-0126 (the North Dakota statute) supra, providing rules for determining residence, uses the term as equivalent to domicil. (Citing) And under the statute with which we are especially concerned, 14-0517, infra, residence is synonymous with domicil."

Since the proper construction of the Wisconsin statute necessarily requires imposition of income taxes upon "every person residing within the state" even though "domiciled" elsewhere (D. 12 to 13), the question now presented is not one of construction but of constitutionality.

This court, assuming the validity of section 71.01, found that the plaintiff came well within the seven months' provision. See D. 12 where the following language is used:

> "I am of the opinion that where one spends most of the 'weekdays,' that is, from Monday to Friday (except his vacation periods) in a place where he has all of his business activities that he thereby 'spends' in the aggregate more than seven months of the income year within the state."

And in D. 13 (commenting upon the seven months' provision of the statute in question):

> "On the basis of such residence alone, income taxation may be sustained by virtue of the Wisconsin statute. *Its constitutionality has not been challenged.*" (Italics added.)

The record discloses that the plaintiff served and filed his original complaint in June 1946; an amended complaint in June 1947; and a second amended complaint in November 1947. An issue was raised in the pleadings (complaint and answer) not only on the question of domicile but also on the question of plaintiff's place of residence.

In all of the plaintiff's complaints the only statute whose validity was attacked was section 71.09(6) (which relates to the making of the so-called "doomage" assessment). No

question was raised as to the constitutionality of section 71.01 either in the pleadings or in the briefs submitted by counsel prior to the decision of this court. The testimony of the plaintiff upon the trial dwelt in detail upon the actual time "spent" by him in the state of Wisconsin during the years in question, upon the basis of which the plaintiff testified to his conclusion that he spent "much less than the seven months here and spent more in days outside of the state—much more than the five months out of Wisconsin." (D. pages 10 and 12; temporary transcript, p. 14.) And with reference to the fact that his wife filed her income tax returns during the years in question with the assessor of incomes at Milwaukee, giving her address as Summit Avenue (Milwaukee), the plaintiff testified that he never made a claim that he and Mrs. Baker had "separate residences or domiciles." He proceeded to explain his wife's filing her income returns in Milwaukee as follows:

> "The fact is that she submitted her return here because she didn't want to be obliged—as I thought the law was—to be in Wisconsin five months of the—or to be out of Wisconsin five months of the year." (D. page 11; temporary transcript, pages 57 and 58.)

It thus appears not only that the issue presently raised as to the constitutionality of the seven months' provision contained in section 71.01 was not raised in any one of the plaintiff's three complaints nor in any of the briefs prior to the decision of this court, but that he industriously sought to bring himself beyond the scope of the seven months' provision by detailed testimony involving mathematical computations as to the time he actually "spent" in the state and out of the state. This was coupled with the testimony above referred to with reference to the residence of his wife (with whom the plaintiff's relations were always amicable), whose reason, as given by the plaintiff, for retaining her residence in Wisconsin was her unwillingness to "be out of Wisconsin" for such period of time as would operate to make her a "non-resident" and thus not subject to Wisconsin income taxation (D. p. 11).

The case is therefore one where the constitutional objection, if such actually exists, has been waived. In *Lewis* v. *The American S. & L. Assoc.*, 98 Wis. 203 at page 227, it is said:

> "There are many well-considered cases sustaining the position that a party may, by his own act or conduct, preclude himself from insisting upon constitutional objections to a statute affecting his rights." *Id.* page 227.

The quotation just given appears with approval in the opinion of *Chief Justice Winslow* in *Leora* v. *Minneapolis etc. R. Co.*, 156 Wis. 386, at page 391, wherein the court also quotes from a New York case to the following effect:

> " 'By failing to raise it (the question of the constitutionality of the act) or to present it in any form for the consideration of the court below, he waived it as effectually as he could have done by express stipulation.' " *Id.* page 391.

See also *Harrington* v. *Downing*, 166 Wis. 582, at 586, where the court quotes from the *Leora* case, particularly from page 392 of the latter case. *Booth Fisheries Co.* v. *Industrial Commission*, 185 Wis. 127, 132, where the court said:

> "It is well settled that constitutional rights as well as any other personal or property right may be waived (Citing Wisconsin cases). The only exception to this principle that we recall is the right of the defendant in a criminal case fo waive a trial by jury."

And see

> *Costigan* v. *Hall*, 249 Wis. 94, 100;
> *State ex rel Wis. Trust Co.* v. *Phelps*, 172 Wis. 147, 154;
> *Hayes* v. *Hoffman*, 192 Wis. 63, 70.

The trial in this action was concluded on January 28, 1948. At no time prior to the presentation of a motion for rehearing in the form of a brief has the matter of the constitutionality of section 71.01 been raised. I have reached

the conclusion that the plaintiff has effectually waived any right which he may have had to raise the question of constitutionality.

Accordingly the court must adhere to its former decision and deny plaintiff's motion to modify the same. Findings of fact and conclusions of law pursuant to the memorandum filed on October 25, 1948 should be promptly presented. Judgment in accordance with such conclusions should be granted in favor of the defendant dismissing the complaint with the usual costs.

CHAS. L. AARONS,
Circuit Judge.

Dated at Milwaukee, Wisconsin this 19th day of October, 1949.

Cover.

Findings of Fact and Conclusions of Law

[Title omitted]

This action having come on for hearing for trial at the January (1948) term of said court and having been tried before the court on the 26th day of January, 1948, Norman J. Baker, appearing for the plaintiff and the Attorney General of Wisconsin by Harold H. Persons, Assistant Attorney General and William J. McCauley, District Attorney, Milwaukee County by Oliver L. O'Boyle, Corporation Counsel, appearing for the defendants; and after hearing the allegation and proof of the parties, the arguments of counsel, and being advised in the premises, now pursuant to the written decisions of this Court filed on October 28, 1948, and October 19, 1949,

I hereby make and file the following Findings of Fact and Conclusions of Law constituting my decision in said action:

Findings of Fact

1. During the years 1943, 1944 and 1945 the plaintiff, Norman L. Baker, was a citizen of the United States and domiciled in the State of Michigan.

2. The plaintiff did not maintain a permanent place of abode in the State of Wisconsin during any of the years 1943, 1944 and 1945.

3. The plaintiff spent in the aggregate more than 7 months of each of the years 1943, 1944 and 1945 within the State of Wisconsin.

4. The plaintiff received income from personal services and intangible personal property during each of the years 1943, 1944 and 1945.

5. The plaintiff made no income tax return or report to the State of Wisconsin, or to any official, agency or department of the State of Wisconsin, of the income received by the plaintiff during any of the years 1943, 1944 and 1945.

6. Upon due and proper notice and in accordance with the provisions of para. (a) of subsecs. (4), (6) and (7) of sec. 71.09 of the Wisconsin Statutes of 1945, the defendant, John H. Leenhouts, as Assessor of Incomes of the Wisconsin Department of Taxation for the Milwaukee District of the State of Wisconsin, made assessments against the plaintiff of income of the years 1943, 1944 and 1945 subject to taxation by the State of Wisconsin, and of Wisconsin income taxes thereon, and entered the same on the tax rolls, as follows:

Year 1943

Income Assessed	$13,000.00		
Normal Tax			
Amount of Tax	458.00		
Interest	37.33		
Tax and Interest		$495.33	
Teachers' Retirement Fund Surtax			
Amount of Tax	70.08		
Interest	5.71		
Tax and Interest		75.79	
Total Taxes and Interest			$571.12

Year 1944			
Income Assessed	$14,000.00		
Normal Tax			
Amount of Tax	528.00		
Interest	16.64		
Tax and Interest		$544.64	
Teachers' Retirement Fund Surtax			
Amount of Tax	81.75		
Interest	2.58		
Tax and Interest		84.63	
Total Taxes and Interest			$628.97
Year 1945			
Income Assessed	$13,000.00		
Normal Tax			
Amount of Tax	458.00		
Interest	None		
Tax and Interest		$458.00	
Teachers' Retirement Fund Surtax			
Amount of Tax	70.08		
Interest	None		
Tax and Interest		70.08	
Total Taxes and Interest			$528.00

7. Pursuant to the provisions of Section 71.36 of the Wisconsin Statutes of 1945, the defendant, John H. Leenhouts, as said Assessor of Incomes, caused to be issued to the defendant George M. Hanley, as sheriff of the County of Milwaukee, State of Wisconsin, warrants commanding

said defendant George M. Hanley, as such sheriff, to make collection of said income taxes so assessed against the plaintiff on income of the years 1943 and 1944, together with all penalties, interest and expenses, and to levy upon the property of the plaintiff and sell sufficient thereof to pay such taxes with the penalties, interest and costs, as provided by subsec. (1) of said Section 71.36 of the Wisconsin Statutes of 1945 which said warrants were returned wholly unsatisfied to and filed with the Clerk of the Circuit Court for Milwaukee County, State of Wisconsin as provided in Section 71.36(2) of the Wisconsin Statutes of 1945.

8. The defendant John H. Leenhouts, as said Assessor of Incomes, intended to enforce the income taxes assessed against the plaintiff as above on income of the year 1945 and collect said income taxes so assessed, with the penalties, interest and costs as provided by law, and to use any and all of the remedies provided by the Wisconsin Statutes to enforce such collection thereof.

9. The plaintiff did not in any of the pleadings or at the trial in any way challenge or contest the validity of the provisions of Section 71.01 of the Wisconsin Statutes of 1945, and particularly the provision that any natural person who spends in the aggregate more than 7 months of the income year within the State of Wisconsin shall be deemed to be residing within the State of Wisconsin for purposes of determination of liability for income taxes and surtaxes, or assert that said provision is invalid or unconstitutional.

Conclusions of Law

1. During the years 1943, 1944 and 1945 and each of said years the plaintiff was residing within the State of Wisconsin.

2. The plaintiff is subject to taxation by the State of Wisconsin upon income received by him during the years 1943, 1944 and 1945 from personal services and intangible personal property.

3. The plaintiff is subject to and liable for the Wisconsin income taxes assessed against him on income of the years 1943, 1944 and 1945 as set forth in Finding No. 6 and

is liable to the State of Wisconsin for said taxes as so assessed.

4. The plaintiff waived any right to raise any question of the constitutionality of the provisions of Section 71.01 of the Wisconsin Statutes of 1945 and particularly the provisions thereof that a natural person who spends in the aggregate more than 7 months of the income year within the State of Wisconsin shall be deemed to be residing within the State of Wisconsin for the purposes of determining liability for income taxes and surtaxes.

5. This action should be dismissed with costs and disbursements to the defendants.

Let judgment be entered dismissing this action with costs and disbursements to the defendants.

Dated this 13th day of December, 1949.
By the Court,

CHAS. L. AARONS,
Circuit Judge.

Cover.

Appellant's request and motion for additional Findings of Fact.
Order denying requested Findings.
Judgment dismissing action.

Issues

Proof of Service of Summons and Complaint.
Summons.
Original Complaint.

Complaint

As Amended to Include Assessment for 1945

[Title omitted]

The above named plaintiff by Norman J. Baker, his attorney, for complaint against the above named defendants alleges and shows to the Court:

1. That said plaintiff is and at all times hereinafter mentioned was a citizen of the United States and of the State of

Michigan, having his domicile and place of residence at the Village of Beulah in the County of Benzie in the said State of Michigan.

2. That said defendant, John H. Leenhouts, is the Assessor of Incomes in and for the City and County of Milwaukee in said State of Wisconsin, and in respect to some matters hereinafter referred to he purports to act for and in the name and as a part of said defendant, Wisconsin Department of Taxation.

3. That said defendant, George M. Hanley, is and at the times hereinafter referred to, was the Sheriff of Milwaukee County, Wisconsin.

4. That said defendant, John H. Leenhouts, as Assessor of Incomes, has no power or authority other than that specifically conferred upon him by Wisconsin Statutes; that Section 71.09, Wisconsin Statutes, relates to the duty of taxpayers to file returns and the power of the Assessor of Incomes and the Tax Commission to make assessments, and it includes subsection 6 which reads:

> "(6) In case of the failure on the part of any person to make a report of income within the time and in the manner prescribed by law, the Department of Taxation or Assessor of Incomes may enter an assessment against said person upon ten days' notice in writing in a sum of not less than $500.00. Such notice may be served by mail. After the tax on such assessment has been entered on the assessment roll, the person assessed shall be forever barred from questioning the correctness of the same in any action or proceeding."

5. That said subsection 6 of Section 71.09 is the only provision of Wisconsin Statutes conferring power upon the Assessor of Incomes to assess the income of one who refuses to make a return.

6. That said defendant, John H. Leenhouts, at all times herein referred to, had specific notice and well knew that said plaintiff, Norman L. Baker, was not a resident or taxpayer in Wisconsin in either of the years 1943 and 1944, and at all such times was and is domiciled at Beulah in the State of Michigan.

7. That on or about the 19th day of November, 1945, as plaintiff is informed and believes, the said defendant, John H. Leenhouts, pretending to act pursuant to said subsection 6 of Section 71.09, Wisconsin Statutes, maliciously, wrongfully and unlawfully made an assessment of $1,200.09 upon assumed income of said plaintiff in the years 1943 and 1944, and placed such assessment upon the assessment roll in his office and that thereafter he caused the same to be entered upon the tax roll.

8. That thereafter and on or about the 25th day of April, 1946, said John H. Leenhouts, Assessor, in the name of Wisconsin Department of Taxation, maliciously, wrongfully and unlawfully caused a so-called delinquent income tax warrant to be issued and delivered to said defendant, George M. Hanley as Sheriff of Milwaukee County, Wisconsin, purporting to command said Sheriff to make collection of said unlawful assessment with penalty, interest and expenses, and to levy upon the property of said plaintiff; and that said defendant, George M. Hanley as such Sheriff, pursuant to said warrant has demanded payment by said plaintiff, of said unlawful assessment and will, unless restrained, as plaintiff is informed and believes, levy upon the property of said plaintiff and forcibly collect said amount from the property of said plaintiff and thus cause him loss and embarrassment for which there is no adequate remedy at law.

9. That said assessment and tax is wholly void because plaintiff in said years was not a taxpayer or resident of the City or County of Milwaukee or the State of Wisconsin, but as Assessor well knew, had his domicile and permanent residence in Beulah in the County of Benzie and State of Michigan and at no time in either of said years, lived or resided in Wisconsin and had no income from any business or property in the State of Wisconsin and was not liable to income tax therein or required to make any report of income.

10. That the malicious, wrongful and unlawful determination of the Assessor that plaintiff was domiciled in the City of Milwaukee and was liable to income tax assessment, must be subject to judicial review but the Wisconsin Statutes provide no judicial review or remedy and plaintiff has no other remedy than an action in equity to avoid and enjoin the collection of said assessment.

11. That the provision of said subsection 6 reading,

"After the tax on such assessment has been entered on the assessment roll, the person assessed shall be forever barred from questioning the correctness of the same in any action or proceeding."

if applicable to the case of one who is or claims to be domiciled in another state and for that reason not a taxpayer of Wisconsin and not liable to income taxation and not required to make a report of his income to the Assessor, is unconstitutional and void for the reason that it would contravene, violate and deny the plaintiff the protection of, the following provisions of the Constitution of Wisconsin and the Constitution of the United States:

(1) Section 9, Article I, Wisconsin Constitution:

"Every person is entitled to a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property of character, he ought to obtain justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

(2) Section 1, Article IV, Wisconsin Constitution:

"The Legislative power shall be vested in a Senate and Assembly."

(3) Section 2, Article VII, Wisconsin Constitution:

"The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace. The legislature may also vest such jurisdiction as shall be deemed necessary in municipal courts, and shall have power to establish inferior courts in the several counties, with limited civil and criminal jurisdiction. Provided, that the jurisdiction which may be vested in municipal courts shall not exceed in their respective municipalities that of circuit courts in their respective circuits as prescribed in this constitution; and that the legislature shall provide as well

for the election of judges of the municipal courts as of the judges of inferior courts, by the qualified electors of the respective jurisdictions. The term of office of the judges of the said municipal and inferior courts shall not be longer than that of the judges of the circuit courts."

(4) Section 13. Article XIV, Wisconsin Constitution:

"Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution shall be and continue part of the law of this state until altered or suspended by the legislature."

(5) Section 1, Article XIV, Constitution of the United States:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty of property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

12. That no remedy for judicial review of or against the arbitrary, malicious, wrongful and unlawful acts of said defendants herein alleged is provided by Statute or exists under the Statutes of the State of Wisconsin and plaintiff has no adequate remedy at law and his rights can be protected and secured only in this action in equity.

And said plaintiff for a second and separate cause of action against said defendants alleges and shows to the Court as follows:

Said plaintiff by reference thereto incorporates in this statement of such second cause of action the several paragraphs marked 1, 2, 3, 4 and 5 and makes them by reference allegations of this second cause of action.

That said plaintiff further alleges that said defendant, John H. Leenhouts, at all times herein referred to had specific notice and well knew that said plaintiff, Norman L. Baker, was not a resident or taxpayer in Wisconsin at any time in the year 1945 and throughout said year was and still is domiciled at Beulah in the State of Michigan.

That on or about the 5th day of May, 1947, as plaintiff is informed and believes, the said defendant John H. Leenhouts, pretending to act pursuant to said Subsection 6 of Section 71.09, Wisconsin Statutes, maliciously, wrongfully and unlawfully made an assessment against said plaintiff upon the assumed income of said plaintiff in said year 1945, and placed such assessment upon the assessment roll in his office and threatens to cause such assessment to be entered upon the tax roll and to force payment thereof by warrant issued to said Sheriff.

And said plaintiff as further allegations in this second cause of action herein by reference restates and incorporates the allegations of said first cause of action in paragraphs numbered 8, 10, 11 and 12.

Wherefore plaintiff demands judgment forever restraining and enjoining the collection or enforcement of the income tax assessments herein above referred to or any other assessment of income received by plaintiff in the years 1943, 1944 and 1945, or in any of said years, and adjudging such assessments to be void.

NORMAN J. BAKER,
Attorney for Plaintiff

P.O. Address
324 East Wisconsin Avenue
Milwaukee 2, Wisconsin

(Verification omitted)

ANSWER TO AMENDED COMPLAINT

[Titled Omitted]

The above named defendants by their attorneys answering the amended complaint of the plaintiff in the above entitled action:

I. For answer to the first cause of action:

1. Admit that the plaintiff is, and at all of the times mentioned in the amended complaint was, a citizen of the United States.

2. Deny that the plaintiff is, and at all of the times mentioned in the complaint was, a citizen of the State of Michigan, having his domicile and place of residence at the Village of Beulah in the County of Benzie in said State of Michigan.

3. Admit that the defendant John H. Leenhouts is the Assessor of Incomes in and for the City and County of Milwaukee in the State of Wisconsin and in respect to the matters set forth in the complaint purports to and does act for and in the name of and as a part of the defendant Wisconsin Department of Taxation.

4. Allege that the defendant Wisconsin Department of Taxation is a department of the State of Wisconsin created by Wisconsin Statutes as an agency and division of the state government of the State of Wisconsin and that the defendant John H. Leenhouts as said assessor of incomes is an official or employee of the State of Wisconsin.

5. Admit that the defendant George M. Hanley is, and at the times referred to in the complaint was, the sheriff of the County of Milwaukee in the State of Wisconsin.

6. Admit that the defendant John H. Leenhouts as said Assessor of Incomes has only that power or authority specifically conferred upon an assessor of incomes by the Wisconsin Statutes or which may be delegated to or conferred upon him by the Wisconsin Department of Taxation in accordance with the provisions of the Wisconsin Statutes.

7. Admit that sec. 71.09 of the Wisconsin Statutes relates to the duty of taxpayers to file returns of income and the power of the assessor of incomes and of the Wisconsin Department of Taxation to make assessments of income taxes and includes subsec. (6) as quoted on page 2 of the complaint.

8. Deny that said subsection (6) of sec. 71.09, Wisconsin Statutes is the only provision of the Wisconsin Statutes conferring power upon or authority to an assessor of incomes to assess the income and income taxes of one who refuses to make a return or report of his income for purposes of the Wisconsin income tax laws.

9. Deny that the defendant John H. Leenhouts at all times referred to in the complaint had specific notice of or knew that said plaintiff was not a resident of the State of Wisconsin in either of the years 1943 or 1944 or had specific notice of or knew that at all of the times in either of the years 1943 and 1944 the plaintiff was or is domiciled at Beulah in the State of Michigan.

10. Admit that at all of the times mentioned in the complaint the defendant John H. Leenhouts had knowledge that the plaintiff claimed he was not a resident or taxpayer in Wisconsin at all times in the years 1943 and 1944.

11. Deny that the plaintiff was a nonresident of the State of Wisconsin during the years 1943 and 1944 or either of said years.

12. Admit that on November 19, 1945 the defendant John H. Leenhouts acting pursuant to the provisions of subsection (6) of Section 71.09 of the Wisconsin Statutes and of any other applicable provisions of the Wisconsin statutes made an assessment of Wisconsin income taxes against the plaintiff in the sum of $1,200.09 upon income of the plaintiff of the years 1943 and 1944, and further Admit that said defendant John H. Leenhouts as said Assessor of Incomes placed and entered such assessment upon the assessment roll in his office and entered the same upon the tax roll.

13. Deny that the making of said assessment of said Wisconsin income taxes against the plaintiff in respect to income for the years 1943 and 1944 was wrongful or unlawful, or malicious.

14. Deny that the placing and entering of such assessment upon the assessment roll or the entering of the same upon the tax roll was wrongful or unlawful.

15. Allege that the making of said assessment, the placing and entering the same upon the assessment roll, and the entering the same upon the tax roll were done and performed in accordance with and pursuant to the provisions of the Wisconsin Statutes.

16. Allege that on September 21, 1945 the defendants Wisconsin Department of Taxation and John H. Leenhouts, Assessor of Incomes, duly notified the plaintiff to make and file income tax reports of the income of the plaintiff of the years 1943 and 1944, which notice was given by a letter sent to said plaintiff that date by registered mail, of the following content:

(Copy of letter omitted)

17. Allege that the said plaintiff failed to comply with said notice of September 21, 1945; that he failed to make any return or report of his income to or file the same with the defendant Wisconsin Department of Taxation or the defendants John H. Leenhouts as the assessor of incomes; and that on October 29, 1945 the defendants Wisconsin Department of Taxation and John H. Leenhouts, Assessor of Incomes, duly gave to the plaintiff notice in writing by a letter sent to the plaintiff on said October 29, 1945 by registered mail, of the following content:

(Copy of letter omitted)

18. Allege that said plaintiff failed to make or file any report or return of his income for the years 1943 or 1944, or of either of them, and that on November 19, 1945 the defendants Wisconsin Department of Taxation and John H. Leenhouts, Assessor of Incomes, duly notified the plaintiff in writing that pursuant to the notice given to the plaintiff under date of October 29, 1945, as hereinbefore mentioned, assessments of income for the years 1943 and 1944 had been made against the plaintiff and that said assessments with the taxes and interest computed thereon would be entered on the January 1, 1946 tax roll, which said notice was sent

to the said defendant by registered mail in the form and content as follows:

(Copy of letter omitted)

19. Allege that the plaintiff Norman L. Baker has made no return or report of any kind or content to the defendant Wisconsin Department of Taxation, or to the defendant John H. Leenhouts, Assessor of Incomes, or to any other official of the State of Wisconsin, of the income of the plaintiff of the years 1943 and 1944, or of either of said years.

20. Allege that on the 10th day of December, 1945 the said assessment of income of the plaintiff of the years 1943 and 1944 and of the Wisconsin income taxes thereon, computed in accordance with the notice to the plaintiff given on November 19, 1945 and with the statutes of the State of Wisconsin, was placed upon the assessment roll in the office of the defendant John H. Leenhouts, Assessor of Incomes.

21. Admit that thereafter and on April 25, 1946 the defendant John H. Leenhouts, as Assessor of Incomes, caused to be issued to the sheriff of the county of Milwaukee and state of Wisconsin, by the defendant Wisconsin Department of Taxation, a warrant pursuant to the provisions of sec. 71.36 of the Wisconsin Statutes, which was delivered to the defendant George M. Hanley, as Sheriff of said county of Milwaukee, state of Wisconsin on said April 25, 1946.

22. Admit that said warrant commanded said defendant George M. Hanley as said sheriff to make collection of said income taxes so assessed together with all penalties, interest and expenses as provided by the Wisconsin statutes and to levy upon the the property of said plaintiff and sell sufficient thereof to pay such tax with the said penalties, interest and costs as provided by law.

23. Allege that on said April 26, 1946 the said defendant George M. Hanley as such sheriff served said income tax warrant upon the plaintiff by delivering to and leaving with him personally a true copy thereof.

24. Admit that the defendant George M. Hanley as such sheriff did thereupon, pursuant to said warrant, demand payment of plaintiff of the amount of said taxes with the penalties and costs provided by law.

25. Allege that the said plaintiff then and there refused to make payment of the said delinquent income taxes with the penalties, interest and costs as provided by law, and that thereafter the said defendant George M. Hanley as such sheriff did return said warrant wholly unsatisfied on April 29, 1946 filed the same with the Clerk of the Circuit Court for Milwaukee County, state of Wisconsin.

26. Admit that said defendants Wisconsin Department of Taxation and John H. Leenhouts intend to enforce the claim of the State of Wisconsin for the Wisconsin income taxes so assessed, with the penalties, interest and costs as provided by law, and to that end will, and it is their duty to, use any and all of the remedies provided by the Wisconsin statutes in respect to the same and take all lawful steps, actions or proceedings to enforce the collection thereof.

27. Deny that the enforcement of the collection of said Wisconsin income taxes so assessed, with the penalties, interest and costs as provided by law, will cause the plaintiff loss or damage and Allege that any alleged loss or injury he may deem that he suffers by reason thereof is *damnum absque injuria*.

28. Allege that under the Wisconsin statutes the plaintiff was afforded an adequate remedy to protect himself in the premises by complying with the said notifications of September 21, 1945 and October 29, 1945 by filing with the defendant Wisconsin Department of Taxation or the defendant John H. Leenhouts, Assessor of Incomes an income tax return or report showing his income of the years 1943 and 1944 or separate returns and reports of his income for each of said years, and then before any assessment of income or income taxes in respect to income of the years 1943 and 1944, or either of them, could be made against him notice in writing would be required as provided in sec. 71.12 of the Wisconsin Statutes and the plaintiff would have all of the rights and privileges for hearing upon and review of such asserted income tax liability as provided by the Wisconsin statutes; that said defendant wholly failed to make any report or income tax return to the defendant Wisconsin Department of Taxation or to the defendant John H. Leenhouts, Assessor of Incomes of the income of the plaintiff

for the years 1943 and 1944, or either of said years, in response to said notices of September 21, 1945 and October 29, 1945 and has refused and continues presently to refuse to make any such report or return to them or either of them in respect to his income of said years or either of them.

29. Deny that the said assessments and the income taxes assessed and levied against the plaintiff for the years 1943 and 1944 or any of the same are void for the reasons set forth in the complaint or for any other reason.

30. Allege that if the plaintiff now finds himself without remedy under the Wisconsin statutes to review the validity and enforceability of said assessment of income and income taxes against the plaintiff it is due solely to the failure or refusal of the plaintiff to follow, avail himself of or comply with the provisions of the Wisconsin statutes affording administrative remedies in respect thereto, and that the plaintiff is now in no position to invoke any equity jurisdiction of this court for the reason that he has failed to avail himself of or exhaust his administrative remedies as provided by the Wisconsin statutes.

31. Deny that the provisions of subsec. (6) of sec. 71.09, Wisconsin Statutes, or any of them are unconstitutional or void as violative of any of the provisions of the constitution of the state of Wisconsin or of any of the provisions of the constitution of the United States set forth in the complaint or of any other provisions of the constitution of the State of Wisconsin or of the constitution of the United States or for any other reason.

32. Deny that the acts or any of them of the defendants set forth in the amended complaint are arbitrary, or are wrongful or are unlawful, or are or were malicious, and Allege that all of said acts were done and performed pursuant to provisions of the Wisconsin Statutes.

II. For answer to the second cause of action:

(Omitted because same as above answer to first cause except it relates to assessment of 1945.

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Blue Cover.

THE EVIDENCE

Stipulation for and Order Setting Bill of Exceptions.

Corrections in transcript.

Bill of Exceptions and Appearances.

Withdrawal of Defendant's Motion for Summary Judgment.

Norman L. Baker, witness on his own behalf, being first duly sworn testified as follows:

My name is Norman L. Baker. My residence and domicile is Village of Beulah, Michigan. That has been my domicile since January 1, 1941.

Prior to January 1, 1941, my selected domicile was Milwaukee, Wisconsin.

Question: How many homes did you own in 1940? Question objected to by Mr. Persons on behalf of defendant followed by discussion.

Answer is received, but not to contradict the decisions of the Supreme Court referred to in the discussion.

In 1940 and ever since 1923 or 1925, I had two homes, one a summer home at Beulah, Michigan, and other a winter home maintained at Milwaukee.

I purchased the land consisting of five acres in the Village of Beulah in 1923. In 1925 I built a home, which might be called a summer home although it was lined and heatable with a fireplace, but intended for use during the summer months and not during the winter months. In 1939 or thereabouts, I determined to change my domicile from the Milwaukee home to the Michigan home and for that very purpose constructed a new home that was usable all through the winter. It was very substantially built. It could easily be heated by electricity during cool weather with the appliances I had—with an oil burner in the winter and it was built with the announced or declared purpose of making it Mrs. Baker's and my future home, upon change of domicile when convenient.

STATE OF WISCONSIN, CIRCUIT COURT, MILWAUKEE COUNTY

(Circuit Court No. 202-577)

NORMAN L. BAKER, Plaintiff,

vs.

JOHN H. LEENHOUTS, Wisconsin Department of Taxation and GEORGE M. HANLEY, Sheriff of Milwaukee County, Defendants.

JUDGMENT—Filed December 14, 1949, Fred J. Jaeger, Clerk.

This action having been brought to trial before the court and the court having made and filed its Findings of Fact and Conclusions of Law therein and directed judgment for the defendant.

Now on motion of Thomas E. Fairchild, Attorney General of Wisconsin by Harold H. Persons, Assistant Attorney General and William J. McCauley, District Attorney, Milwaukee County, State of Wisconsin by Oliver L. O'Boyle, Corporation Counsel, attorneys for the defendants:

It is adjudged that the complaint and this action be dismissed on the merits and that the defendants have and recover of the plaintiff the sum of Fifty Dollars ($50.00) costs.

Dated this 13th day of December, 1949.

By the Court,

CHAS. L. AARONS,
Circuit Judge.

STATEMENT REQUIRED BY PARAGRAPH 2, RULE 12, OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

IN SUPREME COURT, STATE OF WISCONSIN, AUGUST TERM, 1950

No. 55

NORMAN L. BAKER, Plaintiff-Appellant,

vs.

JOHN H. LEENHOUTS, Wisconsin Department of Taxation, and GEORGE M. HANLEY, Sheriff, Defendants-Respondents.

To said Defendant-Respondents, John H. Leenhouts, Wisconsin Department of Taxation, and George M. Hanley:

Pursuant to Rule 12, Paragraph 2, Rules of the Supreme Court of the United States, you are hereby served with copies of the petition for appeal, order allowing appeal and fixing amount of the appeal bond, assignment of errors and prayer for reversal, statement as to jurisdiction and citation on appeal, in the above entitled cause.

Your attention is directed to the provisions of Rule 12, Paragraph 3, of the Rules of the Supreme Court of the United States, which reads as follows:

"Within 15 days after such service the appellee may file with the Clerk of the Court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this Court asserted by the appellant. There may be included in or filed with such opposing statement a motion by appellee to dismiss or affirm. Where such a motion is made it may be opposed as provided in Rule 7, Paragraph 3."

Dated April 2nd, 1951.

LOUIS QUARLES,
NORMAN J. BAKER,
Counsel for Plaintiff-Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 734

NORMAN L. BAKER,

Appellant,

vs.

JOHN H. LEENHOUTS, WISCONSIN DEPARTMENT OF TAXATION, AND GEORGE M. HANLEY, SHERIFF

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT OPPOSING JURISDICTION

VERNON W. THOMSON,
Attorney General of Wisconsin,
HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin,
Counsel for Appellees.

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JOHN H. LEENHOUTS, WISCONSIN DEPARTMENT OF TAXATION, AND GEORGE M. HANLEY, SHERIFF

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT OPPOSING JURISDICTION

Pursuant to Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, the Attorney General of the State of Wisconsin files this statement opposing jurisdiction.

Nature of the Case

This is an appeal by Norman L. Baker from a judgment of the Supreme Court of the State of Wisconsin entered on November 8, 1950 and reported *Baker* v. *Leenhouts*, 257 Wis. 584 (Adv. Sh.) 44 N.W. 2d 544, in respect to which a rehearing was denied January 9, 1951. This judgment

of the Supreme Court of the State of Wisconsin affirmed a judgment of the Circuit Court for Milwaukee County, State of Wisconsin, dismissing an action brought by the Appellant Norman L. Baker against John M. Leenhouts, who was then the assessor of incomes of the State of Wisconsin for the district which included the city of Milwaukee; Wisconsin Department of Taxation; and George M. Hanley, who was at the time of the commencement of the action the sheriff of Milwaukee County, State of Wisconsin, as defendants. The action so dismissed was to enjoin the defendants from collecting income tax assessments made against said Norman L. Baker upon his assumed income for the years 1943, 1944 and 1945 which had been made against him as "doomage" assessments because and by virtue of his failure and refusal to file an income tax return as requested and demanded by the taxing officials of the state of Wisconsin. At the time of the demands upon the Appellant Norman L. Baker to make and file Wisconsin income tax returns and at the time of the making of the doomage assessments against him he was physically present in the state of Wisconsin, he was engaged in employment as an attorney in the state of Wisconsin, he resided in the state of Wisconsin but claimed a technical domicile at Beulah, in the state of Michigan. The notices of demand to file income tax returns were served upon and received by him in the state of Wisconsin. The notices of doomage assessments were delivered to and received by him in the state of Wisconsin.

The injunction proceedings in the Circuit Court for Milwaukee County were commenced in October 1947. The only challenge of any invalidity or unconstitutionality of any statute of the state of Wisconsin is that set forth in Paragraph 11 of the Amended Complaint in that action. Paragraph 11 of the Amended Complaint is directed towards and attacks only the applicability and validity of subsec.

(6) of sec. 71.09 of the Wisconsin Statutes, which is the statute commonly known as the "doomage" assessment provision. Said Paragraph 11 of the Amended Complaint contains 5 subparagraphs reciting constitutional provisions upon which the Appellant based his claim and assertion in that action that the so-called "doomage" assessment provisions in subsec. (6) of sec. 71.09 of the Wisconsin Statutes were challenged. A search through the Amended Complaint will reveal that there is not another word in the whole Amended Complaint that asserts unconstitutionality of any provision of the Wisconsin Income Tax Law.

The entire tenor of the remainder of the complaint is that the Appellant Norman L. Baker was domiciled at the Village of Beulah, County of Benzie, State of Michigan and that therefore any assessment made under sec. 71.09 was without validity because that statute was invalid and did not confer any power upon the assessor of incomes to make an assessment against the Appellant.

The answer to the Amended Complaint denied the allegation that the Appellant during the times involved had his domicile in and was a resident of the state of Michigan. Thus the matter of residence and domicile of the Appellant was put directly in issue. Obviously as the only allegation or challenge of unconstitutionality of any statute was that contained in Paragraph 11 of the Amended Complaint, the only part of the answer to the Amended Complaint that treats of or makes any allegation respecting constitutionality or validity of any provision of the Wisconsin statutes is that contained in the responsive denial of the unconstitutionality of the provisions of subsec. (6) of sec. 71.09 of the Wisconsin statutes.

The critical part of the provisions of said sec. 71.09 (6) Wisconsin Statutes, which was of concern to the Appellant in that case and gave rise to his challenge of the constitu-

tionality of the provisions of that subsection, is the language in the last sentence which says that after such a doomage assessment has been entered on the assessment roll the taxpayer shall be forever barred from questioning the correctness of the same in any action or proceeding.

The provisions of sec. 71.09 (6) (1945 Wisconsin Statutes) (now section 71.11 (5) Wisconsin Statutes 1949) are as follows:

> "(6) DEFAULT ASSESSMENT. In case of the failure on the part of any person to make a report of income within the time and in the manner prescribed by law, the department of taxation or assessor of incomes may enter an assessment against said person upon 10 days' notice in writing in a sum of not less than $500. Such notice may be served by mail. After the tax on such assessment has been entered on the assessment roll the person assessed shall be forever barred from questioning the correctness of the same in any action or proceeding."

Nevertheless the Circuit Court permitted the Appellant to challenge the assessment by showing factually that he was not within the provisions of the Wisconsin statutes relating to liability for income taxation. The case was tried upon the pleadings as set forth in the Amended Complaint and the answer to the Amended Complaint previously mentioned. The Appellant's entire position at the trial and his sole attack upon the assessment was that factually he was domiciled in the state of Michigan and therefore he was not within the provisions of the Wisconsin Statute imposing income tax liability. In other words, his theory of the case and conduct of the trial was pointed solely towards showing the facts and that they demonstrated that he was domiciled in Michigan. He took the provisions of the Wisconsin income tax law imposing liability for taxes, sec. 71.01, and endeavored to show factually that he did not come within the provisions thereof.

The trial court found that the facts showed he was technically domiciled in the state of Michigan during the years 1943, 1944 and 1945, but the court also found that he spent more than 7 months in the aggregate in each of those years in the state of Wisconsin and therefore he was residing within the state of Wisconsin for the purposes of that statute and came within the provisions of that statute imposing liability for income taxes in such instances. Not until after the court's decision had been rendered and the case fully completed and tried did the Appellant then attempt to make some challenge of the validity of the provisions of sec. 71.01, Wisconsin Statutes. The trial court correctly held that at no time in the proceeding had he ever asserted any invalidity as respects any Wisconsin statutes except the provision in sec. 71.09 (6), previously mentioned. Accordingly the court held that he had not challenged the constitutionality and that he had waived any such challenge and dismissed the action. The Supreme Court of the State of Wisconsin on appeal from the judgment so dismissing the action likewise held that the Appellant had not asserted any challenge of unconstitutionality of any provisions of the Wisconsin statutes other than sec. 71.09 (6) and that the finding of the trial court that the Appellant spent in the aggregate more than 7 months of each of the years in question in Wisconsin was amply supported by the evidence in the record. The Supreme Court of Wisconsin therefore affirmed the dismissal of the action.

The Supreme Court of Wisconsin in its decision did not pass upon or consider the constitutionality of the 7 months' provision in sec. 71.01. By motion for rehearing the Appellant endeavored to have the Supreme Court of Wisconsin so consider said provision but it adhered to its previous decision that the Appellant had waived his right to challenge it because he had not asserted it at the trial of the case and denied the motion for rehearing.

Statutes Involved

The provisions of the Wisconsin statutes imposing income taxes that might be material upon consideration of this appeal are as follows: (All references unless otherwise designated are to the provisions of the 1945 Wisconsin statutes.) (The provisions of the 1945 statutes remained unchanged and were the same all during the years involved. However, since that date there has been a rearrangement of the section numbering and the sections in the present 1949 statutes are in some instances different).

"71.01 Persons and subjects taxable. There shall be assessed, levied, collected and paid a tax on all net incomes as hereinafter provided, by every person residing within the state or by his personal representative in case of death; and by every nonresident of the state, upon such income as is derived from property located or business transacted within the state, except as hereinafter exempted. Every natural person domiciled in the state of Wisconsin, and every other natural person who maintains a permanent place of abode within the state or spends in the aggregate more than seven months of the income year within the state shall be deemed to be residing within the state for the purposes of determining liability for income taxes and surtaxes. * * *"

"71.09 Power of assessment; filing returns; penalties. (1) * * *

"(2) * * *

"(3) * * *

"(4) * * *

"(5) * * *

"(6) In case of the failure on the part of any person to make a report of income within the time and in the manner prescribed by law, the department of taxation or assessor of incomes may enter an assessment against said person upon 10 days' notice in writing in a sum of not less than $500. Such notice may be served by mail. After the tax on such assessment has been

entered on the assessment roll the person assessed shall be forever barred from questioning the correctness of the same in any action or proceeding.

"(7) * * *

"* * *."

Statement of Facts

This case in the Circuit Court for Milwaukee County was the third of three cases in which the Appellant Norman L. Baker endeavored to establish that he was domiciled in the state of Michigan. The first case reached the Supreme Court of the State of Wisconsin and its decision therein was rendered on May 1, 1945 in *Baker* v. *Wisconsin Department of Taxation*, 246 Wis. 611, 18 N.W. 331. It involved the year 1941. The facts in respect to that year, which is a backdrop against which the instant case is to be considered, are stated by the Supreme Court of the State of Wisconsin in its decision in that case at pages 613 to 616 as follows:

"* * * Briefly stated, Baker's contentions are that beginning January 1, 1941, he decided that a house on land which he owned in Beulah, Michigan, should be and was selected by him in good faith as his permanent home and domicile, without any intention of his having a home or domicile elsewhere or of ever returning to Wisconsin; that he then abandoned all evidence of residence and had no permanent place of abode in Wisconsin, and did not there spend in the aggregate more than seven months in a year; that all his declarations, acts, and conduct are consistent with and prove his *bona fide* change of domicile to the new domicile established by him in Michigan; and that the only question involved is whether appellant in good faith intended to change his domicile.

"Due consideration of all matters in the record, including Baker's testimony at the hearing on May 5, 1943, upon which the board's decision and order were based, discloses that the record well warranted the

board finding the following facts stated in its decision. From 1907 to July, 1941, Baker owned and occupied a family dwelling house on Summit avenue in Milwaukee, which he conveyed to his wife in 1941. On his income prior to and including the year 1940 he paid, as a resident of Wisconsin, the income tax assessed thereon. In his income tax return filed in March, 1941, for his 1940 income, he made a declaration to the effect that he had changed his residence from Milwaukee, Wisconsin, to Beulah, Michigan. Upon his failure in 1942 to file a return for his 1941 income, the assessor on July 8, 1942, requested him to make such a return. On August 1, 1942, he stated in a return that Beulah, Michigan, was his legal residence and that in his view he was not subject to the income tax laws of Wisconsin. He omitted to state his gross income for 1941 or any statutory deductions. Thereupon, the assessor determined that he considered Baker domiciled in Wisconsin for 1941 and subject to its income tax laws, and that his gross income for 1941 was $13,166; and upon this he levied the assessment which is in question herein. No deduction for personal exemptions was allowed to Baker, but in the income tax return filed for 1941 by his wife, who resided in the Summit avenue family dwelling place in Milwaukee, she claimed the full personal exemption of $17.50 allowable to husband and wife under sec. 71.05 (2) (b), Stats.

"Ever since 1925, Baker has been continuously employed as an associate general counsel by the Northwestern Mutual Life Insurance Company (hereinafter called 'Northwestern') at its general offices in Milwaukee, and his work was such that he had to travel frequently out of Wisconsin to attend to Northwestern's litigation or other essential duties incidental to his employment. In 1925 Baker constructed a summer residence on his land at Beulah, and there he and his family resorted, and he spent his three-week vacation and many week ends and holidays during the summer months, and frequently also during the early spring and late fall. He usually traveled there by car ferry

between Milwaukee and Ludington, Michigan, and then to Beulah by automobile; and returned to Milwaukee each Monday morning by the same travel accommodations. He planned on retiring from his employment upon becoming eligible to pension in October, 1941; and resolved that he would change his legal domicile from Wisconsin to Michigan. In this he was prompted somewhat by his impression that he was being treated unfairly by an official charged with the statutory responsibility of assessing and enforcing the collection of income taxes in Milwaukee county. But early in 1941 Baker decided it would be inadvisable for him to resign his position with Northwestern because financial reasons then existing and the imminence of war made him hesitant to give up his well-paid employment; and, because, in view of his heavy sense of responsibility to Northwestern as the result of his long years of highly useful service and association, he concluded it was his duty to see to a successful termination important litigation entrusted to his care, which was pending throughout the country and would not be disposed of by the time of his anticipated retirement. In consequence of these circumstances he found it impossible to carry out his contemplated plan of living at Beulah during the entire year; but arranged to spend many week ends there, leaving Milwaukee by car ferry Friday night and returning to Milkaukee early Monday morning.

"In attempting to support his claim that he was not in Wisconsin in the aggregate of more than seven months in the year, and as he found that because of existing restrictions on transportation he could not conveniently continue making week-end trips to Beulah, he often also traveled and spent week ends in Chicago, and returned to Milwaukee ordinarily on Monday morning in time to there perform the duties of his employment. Prior and up to 1941 Baker and his wife and others of his family made their home in their dwelling on Summit avenue, and there kept their household furniture, personal effects and belongings; but he claims that subsequently he arranged to put into opera-

tion his intention of abandoning Wisconsin as his domicile and establishing his new domicile at Beulah, Michigan, by he and his wife turning over active management of that home to their daughters-in-law, who came to live with them there at times shortly after their husbands (petitioner's sons) entered the armed services; but who at times went to live with their husbands. However, Baker and his wife were on friendly terms and continued to occupy a bedroom in that home, and he contributed to the cost of operating it, partly by turning over to his wife $100 per month for necessary expenses, and she rented it to the daughters-in-law, with the reservation that she and her husband be allowed to retain a 'couple of rooms' in the attic. They gave up the occupancy of a sleeping room, which they had occupied on the second floor, and slept in an attic room, but continued to use the second-floor bathroom. During the period in which Baker claims to have abandoned his abode and domicile in Wisconsin he frequently occupied that attic bedroom, and occasionally he slept in the second-floor bedroom or in a room he was using as his private office in a downtown Milwaukee building, which he managed and in which he had some financial interest. He spent but little time, if any, in Beulah in the winter months; and when for the greater part of the year 1941 his employment at Northwestern in Milwaukee required him to be there from Monday to Friday, inclusive, he slept at night as stated, either in the Summit avenue dwelling, or occasionally in the downtown building. His wife did not change her domicile but continued to live and reside during 1941, as she had in the past, in their Summit avenue dwelling, excepting that on occasions she visited Beulah with Baker, especially during his three-week vacation and the week ends of the summer months; and also accompanied him to Chicago on some of his week-end trips. He did not vote in Wisconsin after the fall election of 1940, and has not voted in Michigan."

Both the Circuit Court of Milwaukee County and the Supreme Court of Wisconsin in that case held that upon the basis of those facts the Appellant was domiciled in the state of Wisconsin during the year 1941 and affirmed an assessment of income taxes against him for that year.

In the second case there was involved the Appellant's income tax of the state of Wisconsin for the year 1942. That case was decided by the Supreme Court of Wisconsin on May 13, 1947 in *Baker* v. *Department of Taxation*, 250 Wis. 439, 27 N.W. 2d 467. As respects the facts in that case the Supreme Court of Wisconsin said at page 440 of the opinion as follows:

> "An appeal with respect to an assessment on appellant's 1941 income was before us in *Baker* v. *Department of Taxation* (1945), 246 Wis. 611, 18 N.W. (2d) 331. The facts were carefully reviewed in the opinion filed and it was held that the board of tax appeals was justified in finding that Mr. Baker was domiciled in Wisconsin during that year. He contended that he had abandoned his domicile in Milwaukee and had established one in Beulah, Michigan. In 1942 ration books for himself and his wife were obtained in Beulah instead of in Milwaukee and an automobile which had been registered in Wisconsin the preceding year was registered in Michigan. Other than these facts and the additional fact that Mr. Baker registered as a voter in Michigan in 1943, the facts bearing on this appeal are substantially the same as they were on the prior one. It would serve no useful purpose to restate here what was said there. The additional facts are not of sufficient consequence to overcome the board's finding upon the other evidence."

Here again the endeavor of the Appellant was to show factually that he was domiciled in Michigan. The Supreme Court of Wisconsin held that he was not domiciled in Michigan in the year 1942 on the basis of the facts as stated.

It is of note that in that case the Appellant, Norman L. Baker, challenged the proceedings that were used in making the assessment there and asserted that the assessment should have been made under sec. 71.09 (6), the "doomage" assessment provision which is the provision that was used and invoked in the instant case. The Supreme Court of Wisconsin held that as the proceedings were there conducted they were authorized and valid under other provisions of the Wisconsin statutes. Now when a doomage assessment has been made under sec. 71.09 (6) in the instant case the Appellant challenged the constitutionality of that provision and did not in any way challenge during the trial the validity of any other provision.

The trial court after hearing all of the evidence stated that the facts were essentially the same as in the previous cases with the exception that in August 1942 Appellant submitted to the Wisconsin Department of Taxation a written declaration of residence and domicile in the state of Michigan which he followed up by registration as a voter in Michigan in June or July of 1943 and by actual voting at elections for state and county officers in Michigan not later than 1944. The court found that notwithstanding the facts pertaining to the Appellant's occupations, activities, business and physical presence in the city of Milwaukee were the same as previously stated in the prior years so as to make the question of domicile a close one he was of the opinion that this declaration of intention to make his domicile in Michigan followed up by registration as a voter and actual exercise of the voting privilege in the state of Michigan was of controlling character and weighed the balance in favor of a finding of domicile in the state of Michigan during the years 1943, 1944 and 1945.

But, the trial court then went on to recite the following evidence as shown by the record:

"There is considerable evidence respecting the number of days—and even fractions of days—during which the plaintiff was physically absent from the State of Wisconsin. These absences, excepting certain periods in the summer months which were spent in Beulah, Michigan, were of two kinds: At week ends, that is from sometime during Friday until the following Monday morning, the plaintiff and his wife frequently went to Chicago on a pleasure excursion. At other times the plaintiff and his wife would take a week end trip to Beulah, Michigan. At various times the plaintiff took business trips out of the state on behalf of his employer, the Northwestern Mutual Life Insurance Company. For a time the plaintiff kept entries in the form of a diary respecting the various trips taken by him outside of the state. Later, and after the decision in one of the previous cases, he discontinued that practice.

"On direct examination he testified as his conclusion that during the three years involved he spent 'much less than the seven months here and spent more in days outside of the State—much more than the five months out of Wisconsin.' He gave many details on cross examination. In his testimony he estimates that a correct average of the number of nights that he slept at the Summit Avenue residence in Milwaukee was not more than three and half a week. There were, however, other nights when he slept at his Second Street building office.

"It appears that usually during the three years involved the plaintiff was in Milwaukee from Monday morning until late Friday afternoon, although there were times when he took the noon boat on Friday to go to Beulah, Michigan. His main occupation was that of an assistant general counsel for the Northwestern Mutual Life Insurance Company. For that purpose he had an office in the building of that life insurance company in Milwaukee. His other activities of a business nature involved his work as a trustee of a building known as the Madison Building, otherwise known as

the Second Street Building. He had an office in that building in the city of Milwaukee for the purpose of transacting his office business as such trustee. There, he testified, he wrote 'hundreds of letters.' He also had other business activities in this state in connection with the handling of a family trust in which he and his wife were trustees. This trust handled a variety of securities, including real estate bonds. He also received compensation of $1,500 a year from the Downing Box Company of Milwaukee (whose attorney he had formerly been) but without performing any active services during the years here involved except that he was a director of the company.

"The plaintiff's wife filed her income tax returns during the years in question with the Assessor of Incomes at Milwaukee. The plaintiff had nothing to do with the making of her returns, but he stated that he had seen returns of Mrs. Baker in which she gave her address as Summit Avenue, Milwaukee, stating at the same time that her husband, the plaintiff, was a nonresident. Mrs. Baker usually took the pleasure trips with her husband to Chicago at week ends, and also made the trips with her husband when he went to Beulah, Michigan.

"The plaintiff stated that he made no claim that he and Mrs. Baker had separate residences or domiciles. He added: 'The fact is that she submitted her return here because she didn't want to be obliged—as I thought the law was—to be in Wisconsin five months of the—or to be out of Wisconsin five months of the year.'

"It is quite apparent from the entire testimony of plaintiff that he so construed the seven months' provision of section 71.01 as to make necessary or appropriate a mathematical computation of the exact number of days during which he was physically absent from the State of Wisconsin in order to determine the fact as to whether he 'spends in the aggregate more than seven months of the income year within the state.'" [pp. 18-20 Ap. A. to Appellant's Jurisdictional Statement.]

After reviewing this evidence the trial court said:

"I am of the opinion that such method of computation is not contemplated by the statute in question. Pleasure trips with his wife at week ends and business trips by the plaintiff on behalf of his employer should not be excluded from the time 'spent' in the State of Wisconsin. In making such trips the plaintiff always intended, after attaining the objective of the trip, to return to his headquarters which were unquestionably in Milwaukee. I am of the opinion that where one spends most of the 'weekdays,' that is, from Monday to Friday (except his vacation periods), in a place where he has all of his business activities that he thereby 'spends' in the aggregate more than seven months of the income year within the state.

"* * *

"It must be found that the plaintiff did, within the meaning of sec. 71.01, Wis. Stats., spend in the aggregate more than seven months of each of the income years here involved in the State of Wisconsin; and that he must therefore be deemed to be residing within the State of Wisconsin during such period, notwithstanding the fact that his legal domicile was in Michigan during such period.* * *" [pp. 20-22 Ap. A. to Appellant's Jurisdictional Statement.]

The trial court thereupon made a determination and found that the facts brought the Appellant within the language of sec. 71.01 Wis. Stats., that he had not shown factually that he was outside the language of such provision, and that therefore such assessment was within the language thereof. As he had not carried and discharged the burden of proof of showing his assertion of no authority in the provisions of the Wisconsin Statutes for the making of the assessment and that it was unauthorized by the statutes, the trial court dismissed the case.

The decision of the trial court to this effect was on October 25, 1948. Thereafter on November 8, 1948 the Appellant,

Norman L. Baker, presented to the trial court a brief asking for reconsideration of the case and making an argument as to the constitutionality of sec. 71.01, Wis Stats. Copy of the brief was sent to opposing counsel but there was no motion or notice of motion which is in accordance with the procedure where a motion is involved. This was an irregular and unorthodox procedure. Ultimately the trial court thought that it should be disposed of and directed counsel for the defendants in that case to respond by way of briefs the same as though it were a motion for rehearing. Thereafter the trial court considered the matter and rendered its decision on rehearing in which it was pointed out with definiteness that at no time prior to the filing of this brief for reconsideration had the Appellant ever made any challenge or suggestion of challenge of the constitutionality of sec. 71.01. The court concluded that the Appellant was tardy in raising the question and that after the trial was all over and the court had decided the case upon the basis of the facts brought in at the trial the Appellant was too late to raise that question. The trial court then entered the judgment dismissing the case.

From this judgment appeal was taken to the Supreme Court of Wisconsin which rendered its decision on November 8, 1950 affirming the trial court's disposition of the case expressly holding that under the factual situation in the case the Appellant had not made a timely challenge of the constitutionality of the statute.

It is from this judgment of the Supreme Court of Wisconsin that the Appellant appeals to this court.

No Substantial Federal Question Is Presented

The filing of this statement objecting to jurisdiction by the Attorney General of the State of Wisconsin is occasioned by the fact that the state of Wisconsin is interested in this ap-

peal for the reason that it is an endeavor to enjoin the enforcement of an income tax assessment made by the authorities of the state of Wisconsin.

I. *The Case is Moot.*

At the time of the making of the "doomage" assessments involved herein John H. Leenhouts was the assessor of incomes of the Wisconsin Department of Taxation for the district which included the city of Milwaukee. At the time of the commencement of this injunctional proceeding in October, 1947 and all during the time of the trial and up to the final disposition of the case by the trial court, said John H. Leenhouts was the assessor of incomes for said district. However, subsequently thereto Mr. Leenhouts retired and he has not been for some time, and is not now, the assessor of incomes for that district. His successor is not a party to this action. Mr. Leenhouts as an individual person has no interest in the proceedings. He no longer has any official capacity which would give him any interest in the proceeding. Were an injunction to issue against him today it would be wholly ineffective, for he has no duties or powers to perform or exercise in respect to the assessments involved. Consequently as to Mr. Leenhouts, the case is entirely moot.

Similarly at the time of the commencement of these proceedings in the Circuit Court for Milwaukee County in October, 1947 George M. Hanley was then the duly elected, qualified and acting sheriff of Milwaukee County, State of Wisconsin, to whom an execution or other legal process would be issued to effect a collection of the doomage assessments involved. Mr. Hanley for some time has not been and is not now the sheriff of Milwaukee county. As an individual he has no interest in the proceeding. Were an injunction to issue against him at this time it would be wholly

ineffective. He has no official duties or powers in respect to the assessment involved. His successor in office has not been and is not a party to these proceedings. Therefore, as to Mr. Hanley the case is entirely moot.

The only other named defendant in the proceedings below is the Wisconsin Department of Taxation. It is nothing more than a division of the state government of Wisconsin. It is a department of the state government. It is not a body corporate or a legal entity. The provisions of sec. 73.02 and 73.03 creating the Wisconsin Department of Taxation and defining its powers and duties do not make it a legal entity or give it the right to sue or be sued. It is no more a legal entity that is capable of being made a party to a proceeding than is the laundry division of the State Penitentiary at Waupun, Wisconsin. It is given the power and duty to direct proceedings, actions and prosecutions relating to the income tax laws but it is not constituted a separate legal entity apart from the state of Wisconsin. It is no more a separate legal entity than are the many other departments, boards, commissions and bureaus of the state government of the state of Wisconsin.

Art. IV, sec. 27 of the Constitution of the state of Wisconsin provides as follows:

> "Section 27. The legislature shall direct by law in what manner and in what court suit may be brought against the state."

There are no provisions in the Wisconsin statutes authorizing suits against the state by naming the Wisconsin Department of Taxation as a defendant except a provision in Ch. 227, Wisconsin Statutes, 1949, known as the Administrative Procedure Review Act. That chapter provides a special proceeding for review of decision and orders of administrative agencies of the state of Wisconsin. It provides for review in the circuit court and sets out the pro-

cedure in detail. Sec. 227.16 (1) in specifying how the proceedings for such review shall be instituted prescribes that it is by a petition to the court for such review. It is specifically provided that the petition shall be entitled in the name of the person seeking the review as petitioner and the name of the agency whose decision is sought to be reviewed as respondent, except that where it is a review of the Wisconsin Board of Tax Appeal's decisions then the Department of Taxation shall be the named respondent. This is a special proceeding specifically limited to and directed towards court review of administrative orders and decisions. The purpose in specifying who the respondents named shall be is solely for simplification of the case and in any event is limited solely to a review proceeding under those provisions. The instant case is not a proceeding under said Ch. 227 of the Wisconsin Statutes. It is a straight ordinary injunction action in the Circuit Court for Milwaukee County. It seeks to restrain the enforcement of a state income tax assessment. The exerted force of such an injunction is against the individuals who would be exercising their functions as state officials and must be against someone who has the standing of a legal entity. The case thus is entirely one that is moot for were it to be sent back to the circuit court for entry of an injunction the injunction so entered would be entirely unenforceable for the reason that the present officials who would be charged with and have the power to enforce the assessment are not Mr. Leenhouts or Mr. Hanley or the Wisconsin Department of Taxation. Injunction could issue against Mr. Leenhouts and Mr. Hanley and be fully effective as against them as individuals but would be entirely fruitless. As an injunction against the Wisconsin Department of Taxation it will be unenforceable for there are over 400 employees of that department. It would have to operate against all of such employees.

But the state of Wisconsin obviously is interested in the impact of the instant appeal because of the fact that the subject matter is the assessment of Wisconsin income taxes. However, the state of Wisconsin as such is not made a party to the proceeding. It could not have been a named party defendant in the circuit court injunction proceedings because there is no statutory authority for suing the state in such an action. The state of Wisconsin has not consented to be sued in this type of proceeding and the Attorney General of the state of Wisconsin has no authority or power to waive the immunity of the state from such suit.

It is therefore submitted that this case is at this stage purely moot and for that reason the court should not assume jurisdiction in the case.

II. *Appellant Waived any Challenge of Validity of Sec. 71.01 Wisconsin Statutes*

The trial court in its Finding of Fact No. 9 specifically found as follows:

> "9. The plaintiff did not in any of the pleadings or at the trial in any way challenge or contest the validity of the provisions of Section 71.01 of the Wisconsin Statutes of 1945, and particularly the provision that any natural person who spends in the aggregate more than 7 months of the income year within the State of Wisconsin shall be deemed to be residing within the State of Wisconsin for purposes of determination of liability for income taxes and surtaxes, or assert that said provision is invalid or unconstitutional." [p. 47 of Appellant's Jurisdictional Statement.]

The trial court in its conclusions of law stated as follows:

> "4. The plaintiff waived any right to raise any question of the constitutionality of the provisions of Section 71.01 of the Wisconsin Statutes of 1945 and particularly the provisions thereof that a natural person who spends

in the aggregate more than 7 months of the income year within the State of Wisconsin shall be deemed to be residing within the State of Wisconsin for the purposes of determining liability for income taxes and surtaxes." [p. 49 of Appellant's Jurisdictional Statement.]

The Supreme Court of Wisconsin in its decision in this case reviewed this quoted finding and this quoted conclusion of law and specifically affirmed the same. Appellant here now asserts that the decision of the Supreme Court is not supported by authority and is inconsistent with the settled law of the state. This is erroneous and the Supreme Court in its decision specifically considered the case of *Wendlandt v. Industrial Comm.*, 256 Wis. 62, 39 N.W. 2d 854, which the Appellant there and here now relies upon. The court says specifically that that case is not the case here and held that the Appellant here did not assert any invalidity of the provisions of sec. 71.01 until after all of the issues in the case had been tried and determined by the trial court. It is fundamental that any such issues of constitutionality cannot be raised after the case is all over.

Furthermore the trial court in its opinion on the reconsideration brief of Appellant noted that not only did the Appellant raise no question as to the validity of the seven months' provision in sec. 71.01 but "industriously" tried to place himself beyond the scope thereof by giving detailed testimony and computations of time he actually was physically without the borders of the state, so as to show that he did not spend seven months in each of the years in the state.

The determination of the Supreme Court of Wisconsin upon this issue and the decision of the trial court thereon are adequately supported by the citations in the decision of the Circuit Judge.

III. *No Invalidity of Sec. 71.01 Wisconsin Statutes was Involved in the Trial of This Case*

As previously noted the only assertion in the amended complaint of the Appellant of any charge of unconstitutionality or invalidity of any statute of the state of Wisconsin was the provision in Paragraph 11 of the Amended Complaint. This Paragraph 11 is set forth at pages 51-52 of the Appendix of Appellant's Jurisdictional Statement. It contains the opening language and then has five subdivisions which set out the various constitutional provisions which the Appellant there asserted were the basis for his claim of invalidity of sec. 71.09 (6), the doomage assessment provision. As before noted the reason why the Appellant challenged the constitutionality and validity of the provisions in sec. 71.09 (6) was because of the last sentence which states specifically that after a doomage assessment has been put on the assessment roll it may not be challenged by the taxpayer in any action or proceeding. The trial court did, however, allow him to challenge the validity of the assessment as respects whether or not it was authorized by any provision of the Wisconsin statutes. His only charge or assertion of invalidity of the "doomage" assessments involved in the complaint, and at the trial, was that the factual situation did not come within the language of any of the provisions of the Wisconsin statutes. Specifically his assertion was that the facts as they existed during 1943, 1944 and 1945 were such that he did not come within any of the provisions of sec. 71.01, Wisconsin statutes.

However, at page 7 of Appellant's Jurisdictional Statement the quotation from the opening language of Paragraph 11 of the Amended Complaint would make it appear as though the Appellant was there challenging the constitutionality of other provisions than those set forth in sec. 71.09 (6). A readjng of this paragraph makes it abundantly clear

that what is there stated is a charge that the provisions of subsec. (6) of sec. 71.09 are all that is there attacked.

Under the Wisconsin income tax law every person who receives a net income of $800 or more if single or $1600 or more if married, must make a report to the Department of Taxation in the form prescribed for an income tax return on or before March 15th of each year. In addition there is a provision that whenever in the judgment of the assessment of incomes any person shall be subject to income tax in his district under the provisions of the income tax law he shall notify such person to make a report to him on or before March 15th of each year in such manner and form as is prescribed. Sec. 71.09 (4) (a), Wis. Stats. 1945. On the basis of the return so filed the taxpayer pays the taxes that he computes on the income which he therein discloses as being subject to Wisconsin income taxation. If any income or the whole income disclosed therein is claimed not to be subject to taxation then he so asserts and pays only the tax upon the income which he admits is liable to taxation. Upon the return so filed the Department of Taxation may make an assessment of additional taxes by giving to the taxpayer a notice in writing of such additional assessment. In addition the Wisconsin tax officials are given the power to make field investigations of a taxpayer's assessment as disclosed in his return. An additional assessment whether founded upon an examination of the return or upon a field investigation of the income included in the return cannot be made without giving the taxpayer a written notice of the additional assessment. The taxpayer then is accorded by the statutes a right to have a hearing in respect to the same. He may apply to the department within 30 days thereafter for an abatement of the tax. Sec. 71.12, Wis. Stats. 1945. If the abatement is denied he may then apply to the Wisconsin Board of Tax Appeals for a hearing

upon the matter and there a record is made and the Board of Tax Appeals renders its decision and order respecting the same. Such decisions and orders of the Wisconsin Board of Tax Appeals are subject to review by the circuit court of the county of residence of the taxpayer under the provisions of Ch. 227 of the Wisconsin Statutes, 1945 known as the Administrative Procedure and Review Act. The review proceedings in the circuit court are subject to appeal and review by the Supreme Court of Wisconsin.

However, if a taxpayer is notified by the assessor to make a return and he fails to do so the assessor has nothing upon which to pass or to review. Accordingly sec. 71.09 (6) covers this situation and provides that in case of failure on the part of any person to make a report then the Department of Taxation or the assessor of incomes may enter a doomage assessment against him of not less than $500 upon 10 days' notice in writing. This is the force of sec. 71.09 (6). The doomage assessment cannot be entered until the expiration of the 10 days' notice given to the taxpayer. If the taxpayer comes in during that period and makes a return or a disclosure in respect to the facts relating to his income then the doomage assessment cannot be made and is not made. But, this provision in sec. 71.09 (6) for doomage assessments provides that if the taxpayer does not do so and the doomage assessment is put on the tax roll he is thereafter precluded from challenging the validity of the assessment.

The Appellant here, Norman L. Baker, in respect to the years 1941 and 1942, which were involved in the two previous cases mentioned, *Baker* v. *Department of Taxation*, (1945) 246 Wis. 611, 18 N.W. 2d 331 and *Baker* v. *Department of Taxation*, (1947) 250 Wis. 439, 27 N.W. 2d 467, did respond to the request of the assessor of incomes in those years to file returns for those years. Thereafter the

assessor made additional assessments against him asserting that he was liable to taxation and the procedural review proceedings previously mentioned were all followed and ultimately the Supreme Court of Wisconsin affirmed the holding that he was domiciled in the state of Wisconsin in the years 1941 and 1942.

However, as respects the years 1943, 1944 and 1945, which are here involved, the Appellant wholly refused to make any response to demands by the assessor of incomes that he file income tax returns. He asserted that he was domiciled in the state of Michigan and therefore he did not have to file any return. The assessor of incomes of the Milwaukee district maintained that Mr. Baker was liable to Wisconsin income taxation for those years and ultimately, after several requests for filing of returns, gave him notices of doomage assessments in respect to those years. The Appellant failed and refused to file returns during and within the 10 days after the receipt by him of the notices of doomage assessments. These doomage assessments were found by the trial court to have been made upon due and proper notice and in accordance with the provisions of sec. 71.09 (6).

The doomage assessments did not state any particular grounds or basis upon which they were made but merely notified the taxpayer that an assessment of income was being made against him for each of those years, namely $13,000 for 1943, $14,000 for 1944 and $13,000 for 1945. No response having been received from the taxpayer after the service upon him of the "doomage" assessment notices the tax rates provided by the statutes and the exemptions were applied thereto and the resultant taxes were placed upon the tax roll. [pp. 45-46 of Appellant's Jurisdictional Statement.] Thereafter, pursuant to express provisions in the Wisconsin statutes, a warrant was issued for

the collection of such taxes, which warrant has the effect of a judgment when recorded in the office of the clerk of the circuit court. It is enforced by the issuance of an execution the same as a judgment. The assessor of incomes did threaten to issue an execution or have an execution issued on this warrant and deliver it to the sheriff so as to enforce these taxes.

The Appellant-Taxpayer thereupon commenced the injunction proceedings here involved in the Circuit Court for Milwaukee County against the assessor of incomes, the sheriff and the Wisconsin Department of Taxation. The answer to the Amended Complaint put in issue all of his assertions that he was not liable to taxation under the Wisconsin statutes. The case was tried and so far as the Appellant-Taxpayer is concerned entirely upon the theory that the facts showed he was domiciled in the state of Michigan and he made no endeavor to predicate his case on any other theory or basis than that. After the factual situation as adduced at the trial was held by the circuit judge to establish that he was domiciled in Michigan but that nevertheless the facts showed that he spent in the aggregate more than seven months in the state of Wisconsin in each of the years and therefore the assessment was sustainable under the language in sec. 71.01, the Appellant then endeavored to come in and assert for the first time that the provisions of sec. 71.01 under which he had been proceeding and claiming to be excluded from taxation were unconstitutional and invalid. He had elected to resist the assessment and to conduct the trial entirely upon the proposition that he was not domiciled in the state of Wisconsin during these years but was domiciled in the state of Michigan.

The answer to the Amended Complaint was responsive to the Amended Complaint and put in issue the assertions of the Appellant that he did not come within the language

of the Wisconsin statutes relating to liability for Wisconsin income taxation. Paragraph 9 of the Amended Complaint specifically denied the allegation in the Amended Complaint that the assessor of incomes at all times involved knew that the Appellant was not a resident of the state of Wisconsin in the years involved. Paragraph 10 admitted that the assessor of incomes knew that the Appellant *claimed* he was not a resident of the state of Wisconsin during the years involved. Paragraph 11 specifically denied that the Appellant was a nonresident of the state of Wisconsin during the years involved. Paragraph 29 of the Answer denied that the assessment for the income taxes for the years involved were void for the reasons set forth in the Complaint. Finally Paragraph 32 of the Amended Complaint alleged specifically that all acts done were done and performed pursuant to the provisions of the Wisconsin statutes. The only provision or content in the Answer to the Amended Complaint that was responsive to any assertion of unconstitutionality was in Paragraph 31, which specifically denied the assertion that the provisions of sec. 71.09 (6) were void or violative of any provision of either the Constitution of the United States or of the State of Wisconsin.

Under the state of the pleadings it was incumbent upon the Appellant in asserting that the assessments made were not made pursuant to any provisions of the statutes to present facts which showed that he did not come within any of the provisions of sec. 71.01, Stats., which are the statutory authorizations for the assertions of income tax liability. This section imposes income tax liability upon either jurisdiction over the person receiving the income or jurisdiction over the property from which the income is derived. It was jurisdiction over the person that was here involved. Jurisdiction over the person is asserted in this section by imposing tax liability on "every person residing within

the state." It is then specified when a person is "residing in the state" for such purposes. A natural person "domiciled in the state" is stated to be residing in the state. A natural person "who maintains a permanent place of abode within the state" is stated to be residing therein. Finally a natural person who "spends in the aggregate more than seven months of the income year within the state" is stated to be residing therein.

In order for Appellant to maintain that there was no provision in the statutes of Wisconsin upon which the assessment could be grounded and therefore invalid as unauthorized by any provision of the statute, it was incumbent upon him to assert and prove facts which showed that none of those grounds set forth in the statute actually existed. It was not sufficient for him to prove facts that show only one of the grounds did not exist. It was the Appellant who had taken on the burden of disproving statutory authorization for the assessment. If any of the statutory provisions to which he attempted to apply the facts were claimed by him to be invalid and unconstitutional it was incumbent upon him to assert it. But, this he did not do. He made no charge of any kind that any provision in sec. 71.01 was invalid. What he tried to do was to maintain that the facts showed that he did not come within any of those provisions.

He did not prove factually that he did not spend more than seven months in the aggregate in the state in each of the years involved. He testified in respect to the period of time that he spent in the state in each of the years. But he made absolutely no assertion at the trial that the seven months' provision or any other provision of the statute, sec. 71.01, was unconstitutional or invalid. He claimed that he did not come within the terms of the statute. The only

challenge he made was as to the validity of sec. 71.09 (6), Stats. as previously stated.

Here Appellant endeavors to do the same that he tried to do before the Supreme Court of Wisconsin. He attempts to excuse his failure to make a timely challenge of the validity of the seven months provision of sec. 71.01 by claiming failure or something on the part of the Respondents to specifically ground the assessment thereon. As previously stated it was his burden to challenge the assessment and he elected to challenge it on the grounds that factually he did not come within any of the provisions of sec. 71.01. It is not as though Appellant was not well aware at the trial of the force of this seven months provision. It was not something new to him or that he had not heard of before. Even if, as a matter of pleading, (which is expressly denied) there was nothing to make him aware of the applicability thereof, the cross examination at the trial, consuming 42 pages of transcript, wherein all of the details relative to the time he spent in and out of the state were gone into most thoroughly, should have meant something to him. As further evidence of consciousness on his part of the impact of this seven months provision is his testimony in the record that Mrs. Baker submitted her own personal income tax returns "because she did not want to be obliged—as I thought the law was—to be out of Wisconsin five months of the year." [p. 42 of Appellant's Jurisdictional Statement]. This testimony was on cross examination. But, in addition thereto upon direct examination he testified as his conclusion that during the three years involved he spent "much less than seven months here and spent more in days outside of the state—much more than the five months out of Wisconsin." [p. 42 of Appellant's Jurisdictional Statement]. Here he was testifying on direct examination in presenting his own case.

These two instances, and other testimony throughout the case, conclusively show that at all times during the case the Appellant was conscious of the impact of the seven months provision and he was endeavoring to and did assert that the facts not only proved that he was not domiciled in the state of Wisconsin but that he did not spend an aggregate of more than seven months in any of the years in the state of Wisconsin. His endeavor in this regard was the same as it was in respect to the domicile language. He was contending that the facts showed that he did not come within the language of the provisions respecting domicile, permanent place of abode and seven months spent in the state. Nowhere in the case did he challenge the validity of any of these provisions until after the trial was over and he found that he had not been successful in his approach to the case and the way he had it tried of endeavoring to maintain that factually he did not come within any of the provisions in sec. 71.01, Stats.

The Appellant did not narrow his challenge of the validity of the assessment down to the mere question of whether or not factually he was domiciled in the state of Wisconsin in the years but, being well aware of the other provisions of sec. 71.01, alleged that he was not a "resident" of Wisconsin during the years involved.

In Paragraph 6 of the Amended Complaint it is asserted the Appellant was "not a resident" in Wisconsin in the years involved. In Paragraph 9 of the Complaint it is asserted that the assessments are wholly void because he was not "a resident" and "at no time in either of said years lived or resided in Wisconsin * * *." [pp. 40 and 41 of Appellant's Jurisdictional Statement.] Paragraph 9 of the Answer denies the allegations of Paragraph 6. [p. 55 of Appellant's Jurisdictional Statement.] Paragraph 11 of the Answer specifically denies that he

"was a nonresident of the state" during the years involved. [p. 55 Ap. to Appellant's Jurisdictional Statement.] Thus, nowhere in the Answer is there any grounding of the assessment solely upon the basis of domicile in the state. The pleadings were responsive to the pleadings of the Appellant and asserted validity of the assessment as being within the language of sec. 71.01. If there be any deficiency in this regard in the pleadings it was because the Appellant, upon whom fell the burden of showing the basis upon which he had challenged the assessment, did not plead with particularity.

As nothing in the answer in any way rested the asserted tax liability solely upon domicile the Appellant could have produced facts that would negate any or all the grounds of personal jurisdiction set forth in sec. 71.01. Had the facts which were adduced at the trial showed he was not domiciled in Wisconsin, did not maintain a permanent place of abode in Wisconsin, and did not spend more than seven months in the aggregate in any year in the state, then he would have proved his case. He undertook to prove that he did not come within any of the language of sec. 71.01. However, if the facts adduced did not prove that none of said grounds existed but that one of them did, which was the case here, then he could not prevail as he had failed to carry the burden of factual proof that rested upon him of establishing his assertion that there was no provision in the statutes of Wisconsin that covered him and subjected him to Wisconsin income tax liability. If he did not want to present facts on any or all of the three bases for personal jurisdiction or if the facts presented did not sustain him on any of said grounds, then the only way he could prevail in the case was to challenge the validity of such grounds. But this he did not do until after the factual presentation had gone against him and after he had elected not to chal-

lenge the statute but attempt to disprove application of it on a factual basis. By that time it was too late for him to challenge the validity of this statute.

It is abundantly clear from the entire record in the case that the only challenge which the Appellant intended to and did make below so far as constitutionality is concerned was in respect to subsec. (6) of sec. 71.09 and then not in its entirety but only in respect to the provision therein prohibiting challenging of the validity of a doomage assessment once the same had been made and entered on the roll.

Neither the trial court nor the Supreme Court of Wisconsin passed upon the question of constitutionality of the seven months provision in sec. 71.01. It was not presented to the trial court during the trial and so far as the defendants in that trial were concerned there was no indication that the Appellant as the plaintiff in the case below was challenging the validity of any provision of sec. 71.01. The declination of the lower court and of the Supreme Court of Wisconsin to pass upon the constitutionality of this provision under these circumstances is well grounded. Counsel below tried the case upon the Appellant's theory which was that he did not come within any of the language in sec. 71.01. Obviously the presentation of the facts, cross examination and direct examination, as well and direct evidence presented by the defense, was all conducted and presented in view thereof. Had there been a challenge of the constitutionality of any of the provisions of sec. 71.01 the factual presentation below might have been and would have been conducted in perhaps a very different and much more extensive manner. Where unconstitutionality of a statute is asserted there are many factual bases which should be presented and gone into with much more particularity and much more extensively than where the case is merely a question of whether or not the facts bring the case within

certain language in the statute which is not challenged as to its validity. It is most unfair to conduct the case upon the basis of a question of whether or not the statute is applicable by its terms and then after the factual presentation is made that demonstrates applicability to come along and then assert unconstitutionality. There are many things that might have been gone into quite differently and much more elaborately were there challenge of unconstitutionality. It seems obvious that it should be well understood that where there is a challenge of unconstitutionality in a case there are many facts and situations which would be gone into and produced which may not be necessary and would not be produced in a case where it is solely a matter of application of the statutes to a particular set of facts.

The inference at pages 9 and 10 of the Appellant's Jurisdictional Statement that in the two previous cases, *Baker v. Department of Taxation*, (1945) 246 Wis. 611, 18 N.W. 2d 331, involving income of the year 1941 and *Baker v. Department of Taxation*, (1947) 250 Wis. 439, 27 N. W. 2d 467, involving the year 1942, there was no reference or concern as to the seven months provision in sec. 71.01 is absolutely erroneous. Obviously as both the lower court and the Supreme Court in those two cases found that the facts establish that he was domiciled in the state of Wisconsin in both of those years there was no occasion for the court to give any attention to the seven months provision. However in the record of those cases there is a considerable amount of testimony which goes into the detail of the time that he spent in the state of Wisconsin and the Appellant himself made statements in those cases to the same effect as he did in the instant case that the time which he had spent out of the state on week ends, etc. totalled more than five months and that his calculations of the time that he

had spent in the state of Wisconsin in each of those years was less than seven months. The question of the applicability of the seven months provision was clearly in both of those cases, but because of the finding that he was actually domiciled in the state there was no necessity for grounding the assessment upon that basis.

The statement at page 10 of Appellant's Jurisdictional Statement relative to testimony of the Appellant that he discontinued keeping a record of the time spent in and out of the state of Wisconsin in the years 1944 and 1945 shows that it was his own error in concluding as to what was the grounded basis for the assessment in the instant case. He assumed to determine for himself what basis there was for the assessment and for income tax liability under the statutes and elected to ground his case entirely upon the question of whether or not factually he was domiciled in the state. But at the same time he did not ignore or overlook the provisions respecting seven months residence in the state.

In his own testimony on direct examination he was asked by his own counsel the following questions:

> "Q. How much of the time during 1943 did you spend in Wisconsin?
>
> "A. Well, in 1943, 1944 and 1945 also I spent much less than the seven months here and spent more in days outside of the state—much more than the five months out of Wisconsin.
>
> "Q. That obtained in each of the years 1943, 1944 and 1945?
>
> "A. It does, Yes."

Better than 30 pages of the transcript of the Testimony deals with cross examination of the details and times that the Appellant claimed that he spent out of the state of Wisconsin in the years involved. As against this it seems rather difficult for him to assert that he was not aware of the impact of the seven months provision in the statute.

He stated in his testimony on redirect examination that he discontinued keeping a record of his absences from the state in 1944 and 1945 as follows:

> "Q. Mr. Baker, why did you discontinue keeping a record of your absences from Wisconsin for the years 1944 and '45?
>
> "A. Because of the decision of the Board of Tax Appeals and of the Supreme Court in the previous case that apparently did not make any issue upon the provision of that statute that requires one to submit a report if he had been a resident for five months in the state. I had argued before both bodies that it was not applicable and if applicable was unconstitutional and that in no sense was it more than a mere presumption, and cited authorities to that effect and concluded that that wasn't claimed any longer; that it was based—that my liability was based entirely upon being domiciled in Wisconsin as these decisions said."

He relies entirely upon this statement as being sufficient to ground his assertion that he was not aware of and that there was no assertion upon behalf of the defendant in the trial of the case that the seven months provision might be involved. He makes this notwithstanding, as previously stated, that many pages of the transcript are devoted to a very detailed examination of the days, time and dates that he spent out of the state of Wisconsin and that he spent in the state of Wisconsin. The matter was gone into very thoroughly and covered the entire year 1943. After that he then testified that the years 1944 and 1945 were similar and alike in this respect. It stands not well for him now to say that he had no indication or suggestion in the trial that the seven months provision might be involved. The only reason that he did what he did at the trial was because he himself elected to try the case solely upon the matter of domicile and completely ignore and pass over any other consideration. Thus, it is his own waiver that put him in

the position where he could not and did not challenge the constitutionality until after the case was all over.

It is therefore submitted that no substantial federal question is presented in this case under the circumstances here existent.

Respectfully submitted,

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(4807)

IN SUPREME COURT, STATE OF WISCONSIN

AUGUST TERM, 1950

No. 55

NORMAN L. BAKER,

Appellant,

vs.

JOHN H. LEENHOUTS, WISCONSIN DEPARTMENT OF TAXATION, AND GEORGE M. HANLEY, SHERIFF

REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION

The one new matter set forth in the statement opposing jurisdiction raises the question as to whether the case is moot. It is believed that this argument, heretofore raised in this matter by appellee's brief before the Supreme Court of Wisconsin, but undecided by that court, really involves the question as to whether the action abates by reason of the retirement of a state public official from office.

For nearly one hundred years, the Supreme Court of the State of Wisconsin has held that where a state officer is sued with respect to the conduct of his official duties, the action does not abate, and may be enforced by or against his successor. Thus in mandamus actions to compel a public official to perform his duty to levy and collect taxes or to pay an indebtedness of the state, the court may order

and has ordered a peremptory writ of mandamus to issue directed to and enforced upon the successor in office. *State ex rel Bushnell* v. *Gates, Clerk*, 22 Wis. 10; *State ex rel Sloan, Stevens and Morris* v. *Warner, Sec. of State*, 55 Wis. 271; *State ex rel Burnham* v. *Cornwall*, 97 Wis. 567. In the *Warner* case, the Supreme Court Judgment ends with the order (page 287), "that a peremptory writ of mandamus be issued, directed to the present Secretary of State of the State of Wisconsin, commanding him to audit and allow the relator's claim * * *".

If a successor can be ordered to perform a duty devolving upon the predecessor, no reason is seen why the predecessor cannot be ordered to refrain from an illegal performance of duty threatened by his predecessor. Nor is Appellee's argument that the Wisconsin Department of Taxation cannot be sued founded upon reason or authority.

The organization of the Department of Taxation is covered by Sections 73.02 and 73.03 of Wisconsin Statutes 1949. Section 73.02(1) creates a State Department of Taxation consisting of a Commissioner of Taxation and such other officers and employees as may be hereinafter authorized.

Section 73.03 states, "It shall be the duty of the Department, and it shall have power and authority:". Then follows twenty-five sub-sections defining the powers and duties of the Tax Department, including authority to the Attorney General to appear for the Department in all courts. In actual practice, the Department not only supervises the enforcement of all tax laws, but with respect to income taxes receives payment under such title and issues warrants to the Sheriff for collection by the use of such name. In practically all, if not all, cases involving income tax litigation, the Department is named a party and represents the State.

By Paragraph 26 of the Answer to the Amended Complaint herein, it is specifically admitted that the defendants, Wisconsin Department of Taxation and John H. Leenhouts, intend to enforce the claim of the State of Wisconsin for the Wisconsin income taxes so assessed, with the penalties, interests and costs as provided by law, and to that end will, and *it is their duty to*, use any and all of the remedies provided by Statute.

The duties having been specifically imposed upon the Department, it is not appreciated how any other person could properly be sued. The individuals making up the Department are not acting in the furtherance of any duty imposed upon them as individuals but solely in the furtherance of the duty imposed upon the artificial being or entity, the Wisconsin Department of Taxation. In any event, the objection not having been taken by demurrer or answer, or having in any way been raised before the courts of Wisconsin, it must be deemed waived.

It is respectfully submitted that the court has jurisdiction to entertain the appeal.

Dated at Milwaukee, Wisconsin, this 23rd day of April, 1951.

LOUIS QUARLES,
NORMAN J. BAKER,
Counsel for Plaintiff-Appellant.